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SPEECH

OF

MR. SUTLIFF OF TRUMBULL,

ON THE

RESOLUTIONS INTRODUCED BY HIM

RELATIVE TO THE

CONSTITUTIONAL POWERS OF CONGRESS,

AND THE

FUGITIVE SLAVE BILL.

IN SENATE--January 14, & 15, 1851.

COLUMBUS:
OHIO STATESMAN PRINT.
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SPEECH.

The following resolutions, introduced by him, being under consideration:

RESOLUTIONS,

Resolved, by the General Assembly of the State of Ohio, That the Constitution of the United States established a General Government of limited powers, expressly reserving all powers not thereby delegated, to the States and to the people.

Resolved, That among the powers delegated to the General Government by the Constitution, that of legislating upon the subject of fugitives from service is not to be found; while that of depriving any person of life, liberty, or property, without due process of law, is expressly denied.

Resolved, That, in the judgment of this General Assembly, the act of Congress in relation to fugitives from service, approved Sept. 18, 1850, is unconstitutional; not merely for want of power in Congress to legislate on the subject, but because the provisions of the act are, in several important particulars, repugnant to the express provisions of the Constitution.

Resolved, That it is the duty of the several courts of this State, to allow the writ of Habeas Corpus to all persons applying for the same in conformity with the laws of the State; and to conform in all respects in subsequent proceedings, to the provisions of the same.

Resolved, That while the Constitution of the United States confers on Congress no power to interfere with the internal legislation of the several States, and consequently no power to act within State limits, on the subject of slavery, it does require that Congress, wherever, beyond the limits of any State, it has exclusive legislative power, shall provide efficient securities for the personal liberty of every person unconvinced of crime.

Resolved, That it is the duty of Congress to repeal all acts by which any person is deprived of liberty without due process of law; and especially all acts by which any person is held in slavery in any place subject to exclusive national jurisdiction.

Mr. Sutliff said: Mr. Speaker, it is with no small degree of embarrassment that I proceed to the discussion of the resolutions under consideration. The importance of the sentiments expressed by these resolutions is doubtless admitted by all; but the propriety of their introduction in this body has been doubted by many.

It is not therefore improper that I should say, that it is with reluctance I place myself in an attitude on this floor slightly offensive to any Senator upon this or any other subject; yet, regarding these resolutions as I do, strictly true, and containing sentiments nearly

concerning the interests and liberties of citizens of this State, I regard them eminently proper to be introduced in this place and at this time.

Ours is a government of public opinion. Its principles are professedly truth, justice and equity, in all the social and civil relations. This government rose into being upon the enunciation and maintenance of these principles. If, then, we would preserve and transmit to posterity the free institutions and liberties which we regard as so priceless, we must not forget that eternal vigilance is the price of their maintenance. We are taught this sentiment by our own reflection, as well as by the founders of our government, "that a frequent recurrence to the fundamental principles of civil government is absolutely necessary to preserve the blessings of liberty."

The supreme laws of society, as well as the subordinate civil laws, must conform to, and be expressive of the true relations of man. Hence, in our national bill of rights, the Declaration of Independence, we find the assertion of a few self-evident truths, that every person has an absolute right to life and liberty, and their enjoyment equally; and that being alike individually possessed of those rights, it is becoming for them collectively to establish such rules and regulations for the exercise of their respective rights in their social state, as necessary for the general good. Upon these important principles of truth, justice and equality, our government was founded; promising not only, if adhered to, security of life and liberty to all equally, but an impartial equality in the burthens and blessings of government.

That doctrine of complete civil and political equality, so peculiar to this republic, was not at its commencement assumed as an arbitrary principle, or left subject to disrespect as a caprice, or to denial as untrue. That doctrine is only assumed as a logical conclusion from a few self-evident truths, and was only asserted and maintained upon the ground of its being discovered, and shown to be an important and true political principle; and indispensable in the construction and maintenance of a just government. Other governments seemed, to a greater or less extent, above and independent of the people. Ours was made to be of, and for the people; to emanate from and depend upon themselves. This was not an accidental peculiarity; nor was it designed and ventured upon by the framers of our government as an experiment to avoid the evils resulting from other forms of government. They had the wisdom to perceive that civil laws like physical, depend upon existing relations, and that the science of government, like philosophy, consists in correctly ascertaining these relations, and truly enunciating them. The conclusion from these principles was obvious; that the theory of government as absolutely depends upon its consistency with existing civil relations, and human

or individual rights, for its perfection and value, as a theory in physical science, does upon its truly consisting with existing relations of things.

The founders of our government, therefore, commenced their work by recurring to first principles. They carefully considered the rights and relations of man as an individual and then as a member of society; to ascertain with unerring certainty and precision these relations, to which governments should conform.

In the declaration of the principles of our government, we have, in few words, their premises and conclusions upon the subject. "We hold these truths," they say, "to be self evident:—that all men are created equal; that they are endowed by their creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness. That to secure these rights governments are instituted among men, deriving their just powers from the consent of the governed."

The rights of the individual to life, liberty and the pursuit of happiness, as to lawfully exercise his own liberty, to possess and enjoy his own acquisitions, are asserted to be self-evident, absolute rights. Rights appertaining to ALL individuals, and existing superior to, and independent of government.

The assertion of these principles as the basis of government, was a bow of promise to every friend of liberty. And the founders of our government did well to pledge their lives, their fortunes and their sacred honor for their maintenance.

For more than half a century, this nation has congratulated itself that such pledge was faithfully and successfully redeemed. After those inestimable and true principles of government had been gallantly defended by our then infant nation, and firmly established as the political faith of our national existence, additional securities were added for their perpetuity. A constitution was adopted more perfectly "to secure the blessings of liberty to ourselves and posterity." Our government has constantly grown in greatness and increased in strength. We have continued to cherish the principles of liberty and equality set forth in the Declaration of Independence, and to congratulate ourselves asholding our liberties in such certain security, as no other nation enjoyed. But while thus congratulating ourselves, and watching with deep interest those struggling in the old world to imitate the perfections of our government in the amendments of theirs; we have been suddenly surprised by the enactment of a law in Congress denying to; and setting at naught all those cardinal principles, upon which our government was founded. Believing as I do that the late Fugitive law is not only in violation of those principles of our government to which I have adverted, but utterly unconstitutional, I have submitted these resolutions which I will now proceed to consider.

The first resolution, affirming that the Constitution of the United States establishes a general government of united powers expressly reserving all powers not thereby delegated, to the States and the people, can not be doubted by any one. The first section of the first Article of the Constitution commences in these words: "All legislative powers, herein granted, shall be vested in a Congress of the United States;" thus showing the purpose of the framers of the instrument to be, to vest only certain specified powers in the general government. Article 10, of Amendments of the Constitution is in the following language: "The powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively or to the people."

The second resolution affirms also, of the Constitution, what an inspection of the instrument will show to be only a truism; "that, among the powers delega-

ted to the general government by the Constitution, that of legislating upon the subject of fugitives from service is not to be found; while that of depriving any person of life, liberty or property, without due process of law, is expressly denied." By referring to the 3d clause of the 2d section of Article 4, of the Constitution, it will be seen that no power is there delegated to Congress, respecting "fugitives from service or labor." And in Article 5, of "Amendments to the Constitution," it is expressly provided that no person shall be deprived of life, liberty, or property, without the due process of law. If their power to legislate upon the subject of fugitives from service is claimed for the general government, it must be by an implied and not by an expressly delegated power. The truth of the first two of the series of resolutions, is therefore shown by the Constitution, and admits of neither denial or controversy.

The third resolution asserts the opinion, that the act of Congress in relation to fugitives from service, approved September 18th, 1850, is unconstitutional.

1st. For the cause, implied in the resolution, that Congress has no power to legislate upon the subject; and

2d. Because the provisions of the act are, in several important particulars, repugnant to the express provisions of the Constitution.

It is to the consideration of these two propositions that I propose most particularly to direct the remarks which I shall make upon the subject of these resolutions.

If it can be shown that either of the propositions is true—that Congress had not power under the Constitution to pass the law, or that the act as passed is repugnant to any provisions of the Constitution, the material avowment of the resolution, that *the act is unconstitutional*, will be thereby sustained.

It is my purpose to show that both propositions are true.

I deny that any power is delegated to Congress to legislate upon any of the provisions contained in section two of article four of the Constitution. Upon reading that section, it must be conceded that there is neither *sentence* nor *word* contained in the section, delegating any power to Congress to legislate upon either of the subjects therein mentioned. That clause of the section to which the act of Congress relates, reads as follows:

"No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor; but shall be delivered up on claim of the party to whom such service or labor may be due."

Argument can add nothing to the certainty impressed upon the mind of every one from the reading of this clause, that *no power is delegated* by any *language* there used. I understand this clause as expressing a compact, or agreement between the parties to the instrument, and that in clear, precise and unambiguous terms. And I maintain that no one can, from the language used, reasonably understand or infer anything more. Indeed it will not, and can not be affirmed that this 3d clause of section 2, article 4, of the Constitution, contains any *expressed* delegation of power to Congress. And this fact with *strict constructionists*, and according to long used legal rules of interpreting all writings, ought to be conclusive of the argument.

But from the adoption of the Constitution to the present time, there has obtained, even among eminent jurists, a wide difference in their construction of this instrument. There have always been found upon one side, those who were inclined to so construe the Con-

stitution as to give the largest implied powers to the Federal Government, and to that end insist upon what they term a very liberal construction of the instrument. On the other side there have been found those who have always inclined to a strict construction of the Constitution, and insisted upon retaining to the States and to the people all powers not *expressly* delegated to the General Government, or prohibited thereby to the States. This political difference has been observable ever since the commencement of the General Government, in the judicial as well as in the legislative departments.

If Congress possesses the power to legislate upon the subject of fugitives from labor it will be conceded that it is by a power derived under and by the constitution. At the time the convention was held to frame the constitution, it was understood, and by the act admitted, that each of the States possessed sovereign legislative powers. Each of the States possessed the undoubted exclusive power of legislating over all persons within the State, whether fugitives from other States, or citizens of the State so legislating. And if the General Government has acquired this legislative power, from the States respectively, it must necessarily be by a cession on the part of the States, of this State sovereignty to the General Government. If this is so, the claim of the General Government would thereafter be as undoubted as it would to territory or any other property ceded by a State to the General Government; and held by like evidence of title.

And it may here be observed that the same rules of construction, dictated by common sense as well as common law, applicable to the fair interpretation of every written contract between individuals, are the rules and the *only* rules of construction applicable to the reading of the constitution of the United States.

For the purposes recited in the preamble of the constitution, that instrument provides as follows:

Art. 1, Sec. 1. "All legislative powers herein granted, shall be vested in a Congress of the United States," &c., thus showing in the first clause of the instrument, the intention of delegating only *certain specified legislative powers* to the General Government.

Sec. 8, of Art. 1. "The Congress shall have power to levy and collect taxes," &c., enumerating specifically more than fifty different powers expressly delegated in that section, known as the *general legislative powers* of Congress, and concludes by delegating to Congress all necessary instrumental powers, as follows:

"To make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States, or any department or officer thereof."

It is this clause which authorizes Congress to make laws. But it will be observed this clause only authorizes Congress to make laws which may be *necessary and proper* for carrying into execution those general powers, "the foregoing powers, and all other powers vested by the constitution in the Government of the United States, or any department or officer thereof."

There is, therefore, this observable difference in the extent of legislative power vested by the constitution of the United States and that of the State constitutions. While the most of the State constitutions vest general legislative power, except where specially restricted, in a General Assembly of the State; the constitution of the United States vests only certain specified legislative powers in Congress. The language of the constitution of Ohio is, that

"The legislative authority of this State shall be vested in a General Assembly." The constitution of the United States is in language as before stated, that "All legislative powers granted in the instrument shall be vested in a Congress." And Congress, as we have also seen, has only power to make laws in certain cases, to wit: for carrying into execution the powers vested by the constitution in the United States, or some department or officer thereof.

If, then, Congress has power to legislate respecting "persons held to service or labor in one State under the laws thereof," who may have escaped into another State, it must be for the "carrying into execution" some power general or special, by the constitution vested in, or transferred from the States to the Government of the United States or some department or officer thereof." Previous to the adoption of the constitution, the States respectively held undoubted supreme legislative powers over this subject, and were in the actual exercise of this State sovereignty. It is incumbent, therefore, upon those who claim for the General Government this power of which it is admitted the States were severally possessed, "to show title," to point out the clause and words of the constitution by which the individual State so possessed of it has delegated this power to Congress.

The constitution gives Congress legislative powers, for two purposes, besides the cases where it is *directly* delegated.

1st. "To make laws which shall be necessary and proper for carrying into execution" powers vested by the constitution in the government of the United States.

2d. To make laws which shall be necessary and proper for carrying into execution any powers vested in any department or office of the General Government.

3d. Add to these two classes those direct grants of legislative power, where it is expressly stated that Congress may legislate; and it cannot be pretended that there are any other legislative powers given by the constitution.

If then Congress possesses power to legislate upon the subject of fugitives from service, it must be derived either by direct grant of legislative power, as in Sec. 1, Art. 4, in which it is expressed that "Congress may by general law prescribe," &c.; or it must be found among powers belonging to one of the classes named, for it is only these two classes of powers that Congress is authorized by the constitution to make laws to carry into execution. Those therefore, who affirm that Congress possesses the power under the constitution to make any law respecting fugitives from service, residing in any of the sovereign States, have to show two things, to sustain such affirmation; 1st, that a power over the subject of fugitives has been vested by the States, either in the Government of the United States, or in some department or office of the United States; and 2d, that it is "*necessary and proper* for the carrying into execution such power so vested that such legislation be had.

The last clause of Sec. 3, Art. 4, contains all that is expressed in the constitution upon the subject of fugitives from service; and if in fact any power over the subject has been delegated by the States either "to the Government of the United States, or to any department or office thereof, it must be contained in this clause: "No person held to service or labor in one State under the laws thereof, escaping into another, shall in consequence of any law or regulation therein, be discharged from such service, or labor; but shall be delivered up on claim of the party to whom such service or labor may be due."

Can any one in truth say that this language con-

tains on the part of the States a grant of power over the subject of fugitives from service? If so, to whom is the power transferred? To the government of the United States, or to one of the departments, or officers thereof? There is in fact nothing in the clause contained, showing any power vested by the States, nor is there named in the clause, either "the government of the United States, or any department, or officer of the Government."

It must therefore be admitted that there is not any expressed grant of power by the States upon this subject. If any grant of power on the part of the States is claimed in favor of the general government, or of any department or officer thereof; it must therefore be claimed under an implied grant; under something which ought to have been expressed, but not having been so expressed, must now, owing to the circumstances under which it was omitted, be understood as if inserted. But I deny that such supposed omission, if in fact it could be shown to have occurred by mistake, or in any other manner, could be legally supplied.

It was not the framers of the constitution who accepted and ratified it. After written, and as written it was submitted to the States who sat in convention to read and consider the import of the instrument as expressed by its language. And it was the constitution as so written, and submitted for their consideration, that the States in such convention respectively accepted and ratified. The constitution was of no binding force or effect upon any State that did not see fit to accept and ratify; and the determination of such State whether or not to become a party to the instrument, was made upon the expressed provisions of the constitution as written.

I insist, therefore, that common sense, as well as long established rules of common law would forbid any implied provisions being recognised in the instrument as of any binding force upon the parties to it; even if it could be shown that the framers had unanimously agreed upon an important article or section which had by either mistake or fraud been omitted and left out of the instrument by the framers.

But there is not in fact a shadow of evidence to show that any omission or misunderstanding occurred on the part of any of the framers of the instrument in relation to this clause of the constitution. Nor is there any evidence that any of the framers of the constitution understood that the States would, or could delegate any other powers to Congress than those expressed by the language used.

Neither the framers of the constitution nor the people of the States were ignorant of the nature of the provisions contained in sections 1, and 2, of Art. 4. The articles of confederation adopted by the States Nov. 15, 1777, and under the obligations of which the States still remained, contained in Art. 4, three of the four contracts or stipulations embraced in those two sections—the stipulations, that "full faith and credit shall be given in each State to the public acts, records, and judicial proceeding of every other State;" that "the citizens of each State shall be entitled to all privileges and immunities of citizens of the several States," and, that "a person charged in any State with treason felony or other crime who shall flee from justice and be found in another State shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime," are all substantially transcripts from the compacts or agreements contained in Art. 4, of the articles of confederation. Congress had, under the confederacy, no right to legislate as to either of these compacts or covenants; they were mere treaty stipulations. As to the stipulation that "full faith and credit shall be

given in each State to the public acts, records, &c.," of every other State, there is, in the constitution, appended to the provision as it stood transcribed, the express provision, that Congress may legislate respecting it. And so Congress has a power under this compact, which it did not have under it in the confederacy; and otherwise would not, under the constitution. The other two compacts stand as they did in that instrument without this grant of power to Congress; and there is therefore no legislative power conferred on Congress. There is also in this Art. 4 of the constitution, added to the compact for the surrender of fugitives from justice, a fourth, that under consideration relating to fugitives from service, which is also like the two last a naked compact, without having appended either power or permission for Congress to legislate.

The Constitution, like all other instruments, is subject to fixed legal rules of construction. The first general maxim of interpretation, (as laid down by Vattel and other eminent writers,) is, that "It is not allowable to interpret what has no need of interpretation. When a deed is worded in clear and precise terms—when its meaning is evident, and leads to no absurd conclusion—there can be no reason for refusing to admit the meaning which such deed naturally presents. To go elsewhere in search of conjectures, in order to restrict or extend it, is but an attempt to evade it." The framers of the Constitution were an intelligent body of men, and familiar with the rules of interpretation to which the instrument would be legally subject; and there cannot be found greater precision in the use of language than is manifested in the whole structure of the Constitution of the United States. The draftsman evidently intended to express, and did carefully express, in unambiguous language, every power delegated by the States, and the department or officer of the General Government to which that power should be delegated. There is no evidence existing, that the Convention which framed the Constitution, contemplated any surrender of legislative power on the part of the States that should thereafter accept and ratify the Constitution, beyond what was expressed in the instrument.

As an illustration of the truth of this proposition, let us recur to the special grants of power contained in the Constitution, subsequent to the general powers in Sec. 8, of Art. 1, delegated to Congress.

In Sec. 1, of Art. 2, it is provided that "the Congress may determine the time of choosing the electors," &c.; "that Congress may by law provide for the case of removal," &c. And in Sec. 2, of same Article: "Congress may by law vest the appointment of such inferior officers," &c. In Sec. 3, Art. 3, it is provided that "Congress shall have power to declare the punishment of treason." And the 1st Sec. of Art. 4, provides that "Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State." There is added an express grant of legislative power to Congress in this language: "And Congress may, by general laws, prescribe the manner in which all such acts, records, and proceedings shall be framed, and the effect thereof." In Sec. 3, of Art. 4, it is provided, "New States may be admitted by Congress," &c.; and that "Congress shall have power to dispose of, and make all needful rules and regulations respecting the territory," &c. And in Art. 5, it is provided that "Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution," &c. Showing clearly to my mind, that in every instance where it was contemplated that Congress should exercise any legislative powers which then belonged to the sovereign States respectively, such power is expressed and recognized

by the words of the Constitution as belonging to Congress; and by a fair and reasonable understanding of the language of the instrument is surrendered and conceded by the States.

But, as to the clause relating to "persons held to service," there is not only an absence of any word expressive of power, over those persons, being delegated to any department or officer of the general government, but there is not a single word contained in this clause *recognising any power existing*, either in Congress or any other department or office of the government of the United States upon the subject. It would therefore be inconsistent with the general character of the instrument, preserved throughout by the writer, to suppose that in clause 3, sec. 2, of art. 4, there was intended and understood to be a surrender of a sovereign Legislative power on the part of the States to "the government of the United States, or to any department or officer thereof, without expressing the same by language or word contained in the clause. And this assumption on the part of those who claim *delegated powers* to the general government under this clause is rendered peculiarly absurd from the consideration that there is in the same article three express grants to Congress of legislative power, upon other subjects. And each one of those subjects is of less importance to the States respectively, than that embraced in the clause under consideration. The first of the three cases of delegated power under Art. 4, shows that the framers of the Constitution did not recognise the following provision: "Full faith and credit should be given in each State to the public acts, records, and judicial proceedings of every other State," as *conferring Legislative power upon Congress*. And it could not under the limitations of their powers. And as *necessary* in order to vest Congress with power over this compact expressed in sec. 1, the framers of the Constitution in express terms, provided that "Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved and the effect thereof.

Again in Sec. 2. of Art. 4, is another compact or agreement in the following language, "The citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." But the framers of the Constitution did not, as they did concerning the compact in the preceding section, proceed to delegate to Congress in express language, legislative power over this subject; and Congress not having such power by any other provisions of the Constitution, has no power over the subject matter of the provision. If this be true that Congress is not in fact vested with any power under the Constitution to pass any law in relation to the rights of citizens to the privileges and immunities of citizenship in the several states, as provided for in the 1st clause of sec. 2, how can it be insisted that the following language in clause 3, providing that "No person held to service or labor," &c. confers such power. There is here nothing but the naked agreement; a restriction upon the States from passing any law or regulation which should discharge the person claimed from his existing debt of service to his claimant in the state from whence he may have escaped; but that the person so having escaped shall still remain liable to be given up to the person to whom he owes service, as he would be in the state where he so owed such service. Unlike sec. 1. but like the 1st clause of this section, there is no power conferred by the framers of the constitution upon Congress to legislate upon the subject matter of this clause. And it cannot be supposed such men as the framers of the Constitution held *papers* to be of more importance than *persons*, and required in section 1. an express power to be delegated to Congress for making a law in relation to records; and then intended to leave the persons

named in clause 3, of sec. 2, to the legislation of Congress under *implied* or *imagined* powers.

Indeed, a careful reading of all the provisions contained in Art. 4, must impress every unbiased mind with the belief, that no surrender of the legislative power of the states to the general government in relation to fugitives, either from justice, or service, is made or *intended*, by any provision therein contained.

If it were a question of *title to territory* between a state and the general government, the general government claiming title by cession from a state under the Constitution, or any other instrument, as destitute of all language expressive of the grant; it would be absurd to insist upon title in the General Government. And yet the rule of law is the same; the rule of construction is the same in relation to this question of *sovereignty*, and the supposed question of title. The exclusive sovereign legislative power is admitted to have been vested in the states severally anterior to the ratification of the Constitution. It is claimed that by *some clause* in that instrument the states transferred, or *granted* this power to the general government. The same rules of evidence obtain in all respects in the one case as in the other. *The instrument is the only admissible evidence* to show title in either case. And the language of the instrument must be received and understood as written, in its ordinary meaning and acceptance. "*It is not allowable to interpret what has no need of interpretation*" is the maxim applicable to every instrument of this kind. It is as true of the Constitution of the United States, as it would be of a deed, that, if worded in such clear terms as to lead to no absurd conclusions; there can be no reason for refusing to admit the meaning of the instrument as derived from the plain and obvious sense of the language and words of the instrument. And "to go elsewhere in search of conjecture in "order to restrict or extend it, is," in the words of  Vattel, is "but an attempt to evade it."

I therefore insist that it cannot be made to appear that Congress is, by virtue of any or all the powers delegated by the Constitution to the government of the United States, or any officer thereof, invested with any legislative power over the subject of fugitives from service. There is no such power expressed among the general or special powers delegated by the Constitution. It is not included in any of the incidental or instrumental powers delegated to Congress. And I affirm here, without fear of successful contradiction, that it will not and cannot be shown, by any Senator upon this floor, that such legislative power is asserted in Congress, by any provision or provisions expressed or contained in the Constitution of the United States. No strict constructionist can, with any consistency, ask a more liberal or a more extensive legislative power in Congress than delegated by provisions clearly expressed in the Constitution. Yet, those who assert the power of Congress to legislate upon the subject of fugitives from service, recognize the doctrine of implied general powers, in the largest and most latitudinous sense—a construction which might necessarily justify an exercise on the part of Congress of almost unlimited legislative powers.

The considerations submitted, derived from an examination of the Constitution itself, which to me seems plain and explicit upon the subject, are satisfactory to my mind; and I think should be to every strict constructionist, of the absence of all power under the Constitution on the part of Congress to legislate on the subject of fugitives.

But I know that ever since the commencement of the general government, there have been and still are, eminent statesmen and jurists, who are opposed in

sentiment to the idea of the general government being restricted in the exercise of its legislative powers to the expressed authority conferred by the Constitution. This class of politicians and jurist find a large field for legislative action on the part of the general government in the exercise of what they have denominated the implied powers under the Constitution. The precise limit and extent of this class of powers have not yet been defined by their advocates. If recognised they will probably be found limited hereafter only by the obsolete restraining clauses of the constitution on one side; and some where in the regions of imagined expediency on the other. And those who insist upon the right of Congress to legislate by virtue of those large implied powers will insist upon the power of Congress to legislate upon the subject of fugitives from service.

When I submitted these resolutions, I knew that in denying the power of Congress over this subject, they were opposed to opinions expressed by the majority of the Supreme Court of the United States in 1842, when this subject came under the consideration of that Court. But since the introduction of these resolutions in this body, the present Executive of this State has favored us with an Inaugural Message, in which he has taken occasion, in very decided terms, to lend the weight of his official and judicial influence in favor of the constitutionality of the late Fugitive Law. In that message Governor Wood uses the following expressions in relation to this law of Congress: "I should be false to 'myself, and false to truth, if I did not express the 'opinion that the law is consistent with constitutional 'obligation between the States." And again, the following language: "If the late act violates this instrument, in what does such violation consist?" And this inquiry being made immediately subsequent to a full quotation of all that clause of Art. 4, relating to persons held in service, showing an utter absence of any express power authorizing any legislation by Congress, impress me with the fact that his Excellency belongs to altogether another school than that of strict constructionists, in the opinions which he entertains of the constitutional powers of the Federal Government. Indeed, he makes reference to "public history" to sustain the exercise of this extraordinary legislative power on the part of the Federal Government; and to show that there can be no doubt as to the constitutional right of Congress to legislate upon this subject. Yet with all the respect that I entertain towards the opinion of one so eminent, both as a Statesman and Jurist, I am confident that this opinion must have been hastily formed, and would have been much qualified, if not reversed upon careful investigation and mature reflection.

The opinion expressed by a majority of the Supreme Court in the case of Edward Prigg against the Commonwealth of Pennsylvania, decided at the January term, 1842, is, however, the authority most particularly relied upon by those who maintain the constitutional power of Congress to legislate upon the subject of fugitives from service. And this authority is referred to by Governor Wood in support of the sentiments contained in his Message, that Congress possesses the constitutional power to legislate upon the subject. I admit that the doctrine held by the majority of the Supreme Court in that case, (as reported, 16th Peters, 543,) is in point; and goes to show that the powers of Congress are not limited by the express grants contained in the constitution. That case assumes that implied powers may be exercised by Congress,—and that too, when their exercise is not necessary, but only convenient; or conducive to some imagined public good.

I propose, therefore, to examine this doctrine of construction as applied in that case. And I assert, with-

out fear of controversy on the part of the opponents of strict construction, that the case of Edward Prigg vs. the Commonwealth of Pennsylvania, is not a true exposition of law. In that case the well known and long established rules of courts were departed from. And the very argument in support of the opinion expressed, and by which the court attempt to sustain their assumption, that the Congress of the United States had an implied legislative power over persons held in service, is utterly baseless. It is not understood that a decision of any court can change the law of a constitution or statute. It ought to truly indicate the law of both. But I affirm and hope to show, that this case is a palpable perversion of law, and utterly inconsistent with the provisions of the constitution, in all that part of the opinion given in favor of the legislative power of Congress over the subject of fugitives.

The precise question submitted to that court was whether Sec. 1, of the act passed March 25th, 1826, by the General Assembly of Pennsylvania, was unconstitutional. The question arose upon an indictment predicated upon this section of the statute against Edward Prigg and others. The language of that section is substantially as follows:

"If any person or persons shall from and after the passage of this act, by force and violence, take and carry away any negro or mulatto, from any part or parts of this Commonwealth, to any other place or places whatsoever out of this Commonwealth,..... every such person or persons shall, on conviction thereof, in any court, &c., be deemed guilty of a felony," &c.

Prigg had been indicted under this section, and defended on the ground of the person so taken from the State of Pennsylvania being a fugitive from service, due from him in the State of Maryland. On the part of Prigg it was contended that the act, or that section of the act mentioned, under which he was indicted, was unconstitutional.

1st. Because Congress has the exclusive power of legislation upon the subject matter of the third clause, second section of Article four of the constitution of the United States; and has exercised such power of legislation by the act of February 12, 1793.

2nd. That if the power to legislate upon this subject is not exclusive in Congress, but only concurrent with that of the States, inasmuch as Congress had the power to pass laws upon this subject, and did enact the law of 1793, the State powers to legislate upon the subject became thereby suspended, and therefore the law of the State of Pennsylvania, passed in 1826, was void for want of power in the State to enact the same.

3d. That even if the power of the State still existed to legislate upon the same subject, as a concurrent power with that of the general government, yet inasmuch as the State of Pennsylvania was in conflict with the act of Congress of 1793, it was therefore unconstitutional.

It will readily occur to every lawyer that the language of the statute upon which the indictment in this case was predicated is counter to the language of the Constitution of the United States, as expressed in the third clause, section two, of article four, and that so much of the statute of Pennsylvania, which happened to be the section on which the indictment rested, was therefore void.

But the broad ground was taken by the counsel that Congress possessed legislative power over the subject; and this question was argued and submitted to the Court.

The opinion of the court was delivered by Judge Story—who had before written his commentaries upon the constitution; laying down such rules as were of an undoubted authority; and intended for help to

lawyers and judges, for a correct and certain understanding of that instrument; and the extent of powers conferred thereby to the General Government.

Mr. Story was an eminent jurist, a man of infinite legal learning; but in the views which he entertained of the powers of Congress, he stood in that class politically who had always advocated such a construction of the constitution as conferred the largest legislative powers upon Congress.

It was for his peculiar sentiments upon this subject, as was then understood, that upon the death of Chief Justice Marshall, he was superceded in the appointment made to fill that vacancy.

But, although Mr. Story always inclined to sustain the exercise of implied powers of Congress, I will here recur to his own rules of construction, as laid down in his work on the Constitution; for the purpose of showing that even those rules were utterly disregarded in the opinion of the Court as expressed by him in that case.

Now the important question submitted to the court was whether the constitution had transferred a certain legislative power from the States to the General Government. A conflict had arisen between a State and the General Government, each claiming sovereign legislative power over certain inhabitants of the State; and the decision would go to affect the interests of every State in the Union. The importance of the question submitted, as well as the character and position of the parties; only one of the States whose interests and rights were to be passed upon being represented in the court by counsel—all conspired to require of the court an impartial, unbiased adjustment of the scales of justice, and a faithful adherence to the legal maxims and rules of law applicable to the case. The naked question of title—not of territory—but of what to a State was of higher value, that of legislative sovereignty was submitted.

Let us then recur to the principles adopted under the rules laid down by Mr. Story in his learned commentaries as "Dane Professor of Law in Harvard University," a work published some ten years previous to delivering the opinion of the court in that case; and at a time and under circumstances in which he was able to say that he had "not the ambition of being the author of any new plan of interpreting the constitution, or enlarging or narrowing its powers by ingenious subtleties and learned doubts."

The following extracts I will now read from Mr. Story's commentaries, as, in my opinion applicable to the duties of the court in deciding the case, and will then read the decision—asking of the rules to be regarded by the court in construing the constitution, Mr. Story says, Vol. 1, page 383:

"They the people have declared it the supreme law of the land. They have made it a limited government. They have defined its authority. They have restrained it to the exercise of certain powers, and reserved all others to the States, and to the people."

And again on page 384, he says:

"Where the words are plain and clear, the sense distinct and perfect arising on them, there is generally no necessity to have recourse to other means of interpretation."

Again on page 387, he says:

"Where its words are plain, clear and determinate, they require no interpretation; and it should therefore be admitted, if at all, with great caution, and only from necessity, either to escape some absurd consequence, or to guard against some fatal evil."

And again upon the same page, of the construction to be given, where more than one sense is fairly deducible from the words used, and the provision may come more or less governed according to the intention, he

adds this caution, that, "whenever it is a question of power, it should be approached with infinite caution and affirmed only upon the most persuasive reasons."

Speaking of contemporary interpretations, Mr. Story says, Vol. 1, 388:

"It is obvious that contemporary interpretation must be resorted to with much qualification and reserve. In the first place, the private interpretation of any particular man or body of men, must manifestly be open to much observation. The constitution was adopted by the people of the United States; and it was submitted to the whole people upon a just survey of its provisions, as they stood in the text itself. In different States and in different conventions, different and very opposite objections are known to have prevailed; and might well be presumed to prevail. Opposite interpretations, and different explanations of different provisions, may well be presumed to have been presented in different bodies, to remove local objections, or to win local favor. And there can be no certainty either that the different State conventions in ratifying the constitution gave the same uniform interpretation to its language, or that even in a single State convention the same reasoning prevailed with a majority, much less with the whole of the supporters of it. In the interpretation of a State statute no man is insensible of the extreme danger of resorting to the opinions of those who framed it, or those who passed it. Its terms may have differently impressed different minds. Some may have implied limitations and objects which others would have rejected. Some may have taken a cursory view of its enactments, and others have studied them with profound attention. Some may have been governed by a temporary interest or excitement, and have acted upon that exposition which most favored their present views. Others may have seen lurking beneath its text what commended it to their judgment against even present interests. Some may have interpreted its language strictly and closely; others from a different habit of thinking may have given it a large and liberal meaning. It is not to be presumed that even in the convention which framed the constitution, from the causes above mentioned, and other causes, the clauses were always understood in the same sense, or had precisely the same extent of operation. Every member necessarily judged for himself, and the judgment of no one could, or ought to be conclusive upon that of others. The known diversity of construction of different parts of it, as well as of the mass of its powers, in the different State conventions; the total silence upon many objections, which have since been started, and the strong reliance upon others, which have since been universally abandoned, add weight to these suggestions. Nothing but the text itself was adopted by the people. And it would certainly be a most extravagant doctrine to give to any commentary then made, and *a fortiori*, to any commentary since made, under a very different posture of feeling and opinion, an authority, which should operate as an absolute limit on the text, or should supersede its natural and just interpretation."

On page 390: "Contemporary construction is properly resorted to, to illustrate and confirm the text to explain a doubtful phrase or to expound an obscure clause."

* * * * * "It can never abrogate the text; it can never fritter away its obvious sense; it can never narrow down its true limitations; it can never enlarge its natural boundaries." Again, on page 391, Mr. Story has the following language: "Is the sense of the constitution to be ascertained, not by its own text, but by the probable meaning, to be gathered by conjecture from scattered documents, from private papers, from the table talk of some Statesman, or the jealous exaggeration of others? Is the Consti-

tution of the United States to be the only instrument which is not to be interpreted by what is written, but by probable guesses aside from the text? What would be said of interpreting a statute of a State legislature, by endeavoring to find out, from private sources, the objects and opinions of every member; how every one thought, what he wished, and how he interpreted? Suppose different persons had different opinions, what is to be done? Suppose different persons are not agreed, as to 'the probable meaning' of the framers, or of the people, what interpretation is to be followed? These and many questions of the same sort, might be asked. It is obvious, that there can be no security to the people in any constitution of government, if they are not to judge of it by the fair meaning of the words of the text; but the words are to be bent and broken by the 'probable meaning' of persons, whom they never knew, and whose opinions and means of information may be no better than their own? The people adopted the constitution according to the words of the text in their reasonable interpretation, and not according to the private interpretation of any particular men."

I have now read full and fair expositions of the views entertained and expressed by Mr. Story, carefully and deliberately expressed, published while occupying the responsible position of professor of law in Harvard University; and views and sentiments which he well understood as published by him, were not only to contribute to form the legal opinion of the United States; but, as uttered, were to affect his own reputation in the estimation of the most eminent jurists of this age, and of future times. I have read at length from the opinions expressed and the argument by which he sustained and enforced them, at the risk of being tedious; so that no one should fail to perceive clearly the rules and principles which in 1833, Mr. Story himself maintained and published to the world as the true doctrines applicable to determining the rights of parties under the constitution.

In the light of his own authority, let us now turn to Mr. Story's decision of the important question, the conflicting claim of legislative power over fugitives from service. The title of Pennsylvania, it is admitted was absolute and unqualified to this legislative power at the time of the adoption of the constitution. It was then incumbent on the General Government, the party claiming that the State of Pennsylvania, in common with all the States, by accepting and ratifying the constitution, thereby transferred this power to the Federal Government, to show the clause in that instrument, which divests the State of such power, and delegates it to the General Government.

To support this claim of the federal government the third clause of the 2d section of article 4 of the constitution, was submitted to the consideration of the court.

We have seen that Mr. Story holds, in his commentaries, that

1st—Words are to be understood in their usual and most known signification.

2d—That where the words are plain and clear, and there is no repugnancy and incongruity arising out of the use of them, in such case, there is no necessity to have recourse to other means of interpretation.

3d—That the constitution was adopted by the people of the United States, by their several State conventions as it was submitted to them, "upon a just survey of its provisions as they stood in the text itself,"—that "nothing but the text itself was adopted by the people,"—and that "there can be no security to the people in any constitution of government, if they are not to judge of it by the fair meaning of the words of the text."

In 16th Peters' reports, page 610, Judge Story, in delivering that opinion, says:

"Few questions which have ever come before this court involve more delicate and important considerations; * * * * * and it has become my duty to state the result to which we have arrived, and the reasoning by which it is supported.

"Before, however, we proceed to the points more immediately before us, it may be well—in order to clear the case of difficulty—to say that in the exposition of this part of the constitution, we shall limit ourselves to those considerations which appropriately and exclusively belong to it, without laying down any rules of interpretation of a more general nature. It will indeed probably be found, when we look to the character of the constitution itself, the objects which it seeks to attain, the powers it confers, the duties which it enjoins, and the rights which it secures, as well as the known historical fact, that many of its provisions were matters of compromise of opposing interests and opinions, that no uniform rule of interpretation can be applied to it, which may not allow, if it does not positively demand, many modifications in its actual application to particular clauses—And perhaps the safest rule of interpretation after all will be found,"—in what? In adhering without bias or partiality to those rules that have been established and adhered to in all courts of justice, so long, without any exception, that the memory of man runs not to the contrary; and rules laid down by himself and published to the world as peculiarly applicable to a true exposition of the constitution? Not at all—but to proceed with the reasoning—"perhaps the safest rule of interpretation, after all, will be found to be to look to the nature and objects of the particular powers, duties and rights, with all the lights and aids of contemporary history, and to give to the words of each" [what words?] "just such operation and force, consistent with their legitimate meaning as may fairly secure and attain the ends proposed." What "ends?" "Proposed" by whom?

Mr. Story next refers to the 2d and 3d clause of Sec. 2, Art. 4, and quotes both the clause relating to fugitives from justice, and fugitives from service; and continues "the reasoning," by which the decision of the court is to be supported, if supported at all, as follows: "The last clause, (no person held to service &c.,) is that, the true interpretation whereof is directly in judgment before us." We are probably to be shown that here is a case where the words are not "plain and clear," and so a necessity for interpretation. "Historically, it is well known that the object of this clause was to secure to the citizens of the slave-holding States the complete right and title of ownership in their slaves as property, in every State in the Union into which they might escape from the State where held in servitude. The full recognition of this right and title was indispensable to the security of this species of property in all of the slave-holding States; and indeed was so vital to the preservation of their domestic interests that it can not be doubted, that it constituted a fundamental article, without the adoption of which the Union could not have been founded." The foregoing is "the reasoning of the court," and of this "reasoning," I inquire: has it shown that the clause over which this curious ratiocination and speculation is indulged in, is a clause where interpretation, by the rules of law, as laid down by Mr. Story, in his own commentaries, is allowable at all? Has it been shown or even pretended that the "words are not plain and unambiguous?" If this has not been shown, Mr. Story has said, as before seen, the exposition should be, the plain and most obvious

meaning of the words—and to that meaning, as conveyed by the import of the language of the text, the court should be restricted. If it is such a case as calls for interpretation; if the words are ambiguous, and the sense of the clause doubtful; upon that state of a case being shown, a recurrence to the legal rules of interpretation is hardly permitted, to show—not what is not written, but what is written and meant as expressed by the text, according to its most correct reading. "It is obvious, (in the language quoted from Mr. Story's Com. vol. 1, page 301,) "that there can be no security to the people in any constitution of government, if they are not to judge of it by the fair meaning of the words of the text; but the words are to be bent and broken by the probable meaning of persons whom they never knew," &c. "The people adopted the constitution according to the words of the text, in their reasonable interpretation and not according to the private interpretation of any particular men."

Having thus shown the reasoning of the Court, on as plainly written a sentence as can be found in the English language, let us see what expositions they are able to make, as the true meaning expressed by this clause of the Constitution:

"No person held to service or labor in one State, under the laws thereof, escaping into another, shall in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the person to whom such service may be due."

The Court say, in expressing their conclusions as to what the provision is—

"The slave is not to be discharged from service or labor in consequence of any State law or regulation."

Except substituting the word slave for person; which the framers of the Constitution refused to do; "the reasoning of the Court" has not thus far materially varied the text.

The Court also finds that if the right of the owner of the slave is positively and unqualifiedly recognized, as they find it to be; "then all the incidents to that right attach also; and the owner must therefore have the right to seize and repossess the slave;" and the Court say—

"Upon this ground we have not the slightest hesitation in holding that under and in virtue of the Constitution, the owner of a slave is clothed with entire authority, in every State in the Union to seize and recapture his slave, wherever he can do it, without any breach of the peace, or any illegal violence." And that is all the right he would have in a slave State. "In this sense, and to this extent, this clause of the Constitution may be properly said to execute itself, and to require no aid from legislation, State or National."

The court next passes to the last part of the clause, in these words:

"But shall be delivered up on claim of the party to whom such service or labor may be due."

This part of the clause is quoted by the court, and with the following emendation: "But he (the slave,) shall be delivered up," &c., from which they make the following expositions from those concluding words of the clause:

That a "claim is, in a just juridical sense, a demand of some matter as of right, made by one person upon another, to do, or to forbid to do, some act or thing as a matter of duty."

The court then resumes "the reasoning," to show that this clause of the Constitution does not provide by whom, or in what mode, the "slave" is to be delivered up; that legislation upon the subject would be very convenient; that nothing is found in the State

Constitutions in relation to this subject; and if the legislative power was left in the States, the State Legislatures might be delinquent in the discharge of their duty towards the slave owner. From all which reasoning the court concludes—not that any power is, under this clause of the Constitution, delegated by the States—but that, in the language of the court, "the natural inference is, that the National Government is clothed with the appropriate authority and functions to enforce it." The "reasoning" of the court is somewhat lengthy, but it assumes to sustain this inference by establishing two propositions: 1st, That it is expedient to have Congress exercise legislative power upon this subject. 2d, That Congress is not prohibited, by the Constitution from legislating. And the assumption of legislative power on the subject, by the General Government, is attempted to be sustained by the following quotation from the remarks of Mr. Madison, in No. 43 of the *Federalist*:

"But a right implies a remedy; and where else could the remedy be deposited than where it is deposited by the Constitution?"

"Meaning," (adds the court,) "as the context shows, in the government of the United States." Now, let it be understood, the court have not claimed, in all the "reasoning" indulged in by them, that this clause of the Constitution has delegated any power to the General Government, or even makes mention of the name of the General Government, or any department or office thereof. Was it of such a case Mr. Madison was speaking? The very quotation made shows the contrary, for that brief extract is concluded with the words "deposited by the Constitution." To have been in point, the quotation should have been deposited by "the reasoning of the court." But a more unfortunate quotation from any writer could hardly have been made. Mr. Madison's remark was made in defence of the constitutional power delegated to Congress by section 4 of article 4, which provides that "the United States shall guarantee to every State in this Union a republican form of government," &c. Mr. Madison, as will appear from the preceding part of this No 43 and No. 42, had passed over all the preceding sections of article 4, and this same clause, on which "the reasoning of the court" is employed, without ever discovering or intimating the possibility of the General Government having acquired any powers delegated to it by this third clause of section 2. It will also be perceived by the reader that he by no means intended, or in fact used it in any such sense, as implied by the quotation. After having given the language of the 4th sec. of art. 4, he proceeds to consider and remove by argument the objections which seem to have been urged to delegate on the part of the States such power to Congress as contemplated by the provision, contained in that clause. And it is in this connection that he says:

"In a confederacy founded on republican principles, and composed of republican members, the superintending government ought clearly to possess the authority to defend the system against aristocratic, or monarchical innovations. The more intimate the nature of such a union may be the greater interest have the members in the political institutions of each other; and the greater right to insist that the forms of government, under which the compact was entered into, should be substantially maintained. But a right implies a remedy; and where else could the remedy be deposited than where it is deposited by the Constitution?"

I have thus given the reading of the whole context of the only authority offered by the Court, to show beyond all controversy that such "reasoning" is encountered, rather than countenanced, by the sentiment expressed by Mr. Madison in this essay referred to; and

that he spoke of the "right" of the States "implying a remedy" as only to be realized by an express provision, specially empowering Congress to apply the remedy. I also read his remarks in the next paragraph, as follows:

"It may possibly be asked what need there could be of such a precaution, (sec. 4, art. 4,) and whether it may not become a pretext for alteration in the State government, without the concurrence of the States themselves. * * * If the interposition should not be needed, the provision for such an event will be a harmless superfluity only in the Constitution. But who can say what experiments may be produced by the caprice of particular States, by the ambition of enterprising leaders, or by the intrigues and influence of foreign powers? To the second question it may be answered, that if the general government should interpret by virtue of this Constitutional authority, it will be, of course, bound to pursue the authority. But the authority extends no further than to a guaranty of government, &c."

Showing beyond all doubt that Mr. Madison recognised the Federal Government as invested with precisely that extent of legislative power, and no more, expressly delegated to it by the provisions of the Constitution. Hence in his remarks upon all the powers possessed by the general government, he has only remarked upon those powers actually delegated by the words of the Constitution. In all his writings he says not one word, of the power possessed by Congress under the 3d clause of sec. 2, art. 4,—for the very obvious reason that there is nothing said about it in that clause. It seemed to remain for "the reasoning" of others to show that a clause containing nothing upon a certain subject might be understood to express much upon the same subject.

We have thus seen by reference made to the opinion given by Mr. Story, by what reasoning those judges concurring in the opinion, were able to find that "the natural inference certainly is that the national government is clothed with the appropriate authority and functions to enforce" the right of a slave owner to recapture his fugitive slave from another State, under that clause of the constitution providing that "no person held to service," &c.

The court express the opinion that the Congress of the United States possesses under this clause of the constitution, legislative power over the subject; and that as a consequent the State has no right to legislate upon the subject. But in this decision the court have not been able to find by "reasoning," or otherwise, that either this or any other clause of the constitution by strict or liberal interpretation, expressly delegates any power to the General Government upon the subject. It would have been absurd to assert that clause 3, Sec. 2, Art. 4, by any interpretation, either literal, rational, or mixed, ever known to either court or lawyer, delegated any power by the States to "the government of the United States, or any department, or officer thereof."

I will here state what I understand to be every material point decided by Mr. Story, in this learned opinion. They are:

1st. That in deciding the conflicting claims of legislative power upon the provision of the constitution contained in clause 3, Sec. 2, Art. 4, between a State and the General Government, they do not wish to have it understood that the rules applied to this case are rules applicable to any other case. These are the words: "In the exposition of this part of the constitution, we shall limit ourselves to those considerations which appropriately and exclusively belong to it, without laying down any rules of interpretation of a more general na-

ture." And this pledge would in my opinion have been kept, if they had added, without regarding any rules of interpretation of either a general or special nature.

2d. That no uniform rule of interpretation can be applied to the constitution which may not be modified in its application.

3d. That the safest rule of interpretation after all will be found to be, to look—(at the language of the constitution? not at all) "to the nature and objects of the particular powers, duties, and rights, with all the lights and aids of contemporary history; and give to the words of each just such operation and force, consistent with their legitimate meaning, as may fairly secure and attain the ends proposed."

4th. That historically it is well known that the object of clause 3, Sec. 2, Art. 4, was to secure slave holders in any particular State the complete right and title of ownership in their slaves, as property in every State in the Union into which they may have escaped.

5th. That the Union would not have been formed but for the adoption of this provision.

6th. That by virtue of this provision the "slave is not to be discharged from service or labor in consequence of any State law or organization." And that the owner of a slave is clothed with entire authority in every State in the Union, to seize and recapture his slave. That to this extent the clause executes itself.

7th. That the words "but he shall be delivered up on claim of the party to whom such service or labor may be due," means he (the slave) shall be delivered up on claim of the party, &c., that the word claim indicates some further remedial redress; that claim means in a judicial sense, a demand of some matter as of right made by one person upon another, to do or to forbear to do some act or thing as a matter of duty.

8th. That the questions that arise as to the delivering up of the slave on claim of the party, such as, "by whom to be delivered up? In what mode to be delivered up? Upon what proofs? and other such questions, which readily occur, require the aid of legislation to protect the right, to enforce the delivery, and to secure the subsequent possession of the slave.

9th. From all which preceding considerations, the court decide that "the natural inference is, that the national government is clothed with the appropriate authority to enforce it,"—this provision of the constitution. And that the authority of the General Government is exclusive, and that the States have thereby become divested of all legislative power over this subject.

Two things are particularly to be observed in this remarkable opinion.

An entire disregard of, and studied departure from those rules of the constitution which he had himself taught, and published, and sustained by unanswerable arguments, as applicable to an impartial and true exposition of the constitution.

And the decision that Congress may exercise legislative power where it seems to be expedient to have legislation by the General Government, upon a subject over which no power is vested by the Constitution in the Government of the United States, or any department or officer thereof,—that the power to legislate may be inferred by Congress from the expediency of its exercise, as well as derived by express grant in the constitution.

In vol. 2, page 533, of his Com. Mr. Story makes the following remarks in relation to the powers conferred by the constitution:

When an act is constitutional as an exercise of power, can it be unconstitutional from the motives with which it is passed. The motives of many of the members may be, nay must be utterly unknown. They

may be opposite to, or wholly independent of each other. The constitution would thus depend upon process utterly vague and in comprehensible; and the written intent of the Legislature upon its words and acts, the *lex scripta* would be contradicted or obliterated by conjecture and parol declarations, and fleeting reveries and heated imaginations. No government on earth could rest for a moment, on such a foundation. It would be a constitution of sand heaped up, and dissolved by the flux and reflux of every tide of opinion.

These commentaries were carefully prepared by Mr. Story, in the calm reflections of his leisure hours with all the aid of his own large stores of legal knowledge, derivable from perhaps the best library in the world for the purposes of such a work. They must and do contain the honest, most intelligent, and best sentiments and opinions upon the constitution of the United States, and the rules applicable to its construction, ever entertained or pronounced by him, on any occasion.

I might, therefore, with safety leave his opinion expressed in the Prigg case, having thus shown it to be in direct conflict with, and repugnant to his own deliberate, and often repeated opinions in his commentaries. Mr. Story in his commentaries has remarked at length on the special powers of Congress, under Art. 4, of the constitution; in relation to the powers vested in Congress to pass laws prescribing the mode of certifying and proving records &c.; and to pass laws in relation to the territories &c., but he nowhere in all the numerous and lengthy chapters upon the various powers of Congress, contained in these three volumes, asserts or intimates the opinion that Congress is invested with any legislative power under the 3d clause of section 2, Art. 4.

Let any one recur to the table of contents of this work prepared doubtless by himself, and apparently a correct intimation of the subjects treated of, in each of the 45 chapters; and it will at once be observed that while he has made powers of much less importance the subject of comment, there is no intimation expressed of Congress being invested with any power under this clause of the Constitution.

It has been seen that Mr. Story does not pretend to find in the Constitution any words or language which he claims by fair interpretation, or by any interpretation, delegates any power "to the government of the United States, or any department, or officer thereof." We have also seen that not finding any such "power he proposed, in violation of legal rules by himself recognized and published, to call to his assistance, in search of this legislative power in Congress, "all the lights and aids of contemporary history." And that from such contemporary history, and "the reasoning" of the court upon such history as referred to, the court decide that "the natural inference certainly is that the National Government is clothed with the appropriate authority and functions to enforce it"—meaning the surrender of fugitives.

I will not here say that the lucid statement of the decision of this all important point of the case equals, "the reasoning" and rules of construction of the court, in arriving at it; for the practice of the court in these particulars are without precedent. But it must be very obvious to every reader, that the Constitution does not expressly provide for legislation on the part of Congress in the inferential case stated in this decision.

Now it will be perceived that the court do not infer even, from the contemporaneous history referred to, that any particular power is vested, by any clause of the constitution, in "the government, or in any department, or officer thereof;" but that "the national gov-

ernment is clothed with "the appropriate authority and functions"—the court do not find that the general government is vested by the constitution with power, under the third clause of section two, article four, or in relation to that subject.

Having shown, as I think I have, the utter illegality of departing from the text of the constitution, and resorting to contemporaneous history; it is unnecessary, so far as the law of the case is concerned, to remark upon the history referred to by the court for the purposes of this argument. The court assert that historically it is well known that the object of clause three section two, article four, "was to secure to the citizens of the slave holding States the complete right and title of ownership in their slaves, as property, in every State in the Union into which they might escape, &c." And the court say that this object "was so vital to the preservation of their domestic interests and institutions, that it cannot be doubted that it constitutes a fundamental article, without the adoption of which the Union could not have been formed. Its true design was to guard against the doctrines and principles prevalent in the non-slaveholding States, &c." The court also speaks of "the known historical fact, that many of the provisions of (the Constitution) being matters of compromise of opposing interests and opinions."

Now without admitting that any light, except a "light that leads astray," could be legitimately borrowed from even authentic history to aid a Court in impartially deciding the fact whether clause 3, of section 2, of Article 4, contained a transfer to the Federal Government of the legislative sovereignty of the State of Pennsylvania over such of her citizens as owed service in another State. I deny the statement made by the Court. No such facts are "historically well known." And I here make the assertion in the hearing of able Senators who will reply to me, and in the immediate vicinity of a library which will enable them to correct me of wrong. There is no history or evidence existing that will show that this clause of the Constitution was inserted or adopted as assumed by the Court, as a matter of compromise of opposing interests. There were other clauses of the Constitution, upon which were differences of opinion, and which were finally settled by compromise. But so far from its being well known "historically," that the object of this clause was to secure citizens of the slave holding States in reclaiming their slaves from free States, and that "its true design was to guard against the doctrines and principles in the non-slave holding States;" there is neither history or romance contemporary with the adoption of the Constitution which either teaches or assumes such to be the fact. To assert that, clause 3, section 2, Art. 4, was "to guard against the doctrines and principles prevalent in the non-slave holding States," being matter of history is not only untrue, it is absurd. "Historically it is well known," that at the time of the adoption of the Constitution there were no non-slave holding States in the confederation.

It does not to me, as I have said, seem important to the consideration of this decision to show the incorrectness of their historical assumptions, after showing, as I have, that the point made in the case did not admit of any reference to history; yet, as the opinion expressed in Governor Wood's message seems to be sustained by him entirely by "the reasoning" and "contemporary history" of the supreme court as expressed by Mr. Story; I propose to show some errors in the "history" as well as law set forth in this opinion.

I certainly understand Mr. Story, as intimating, in his opinion, the doctrine asserted by Gov. Wood, in his message, that "it is matter of public history that

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this provision (of Art. 4,) was inserted in the Constitution of the United States, as the result of a compromise; and for the purpose of enabling the owners of slaves to recover them in the free States; and that without it, no Union could have been formed." I have said, there is no such history; and I also say there is no evidence that the opinion expressed by Mr. Story is true, that the insertion of the clause, in relation to fugitives, "constituted a fundamental article without the adoption of which the Union could not have been formed." I might content myself with denying this assumption; and there being no history to show it, it would rest in bare conjecture. But I think the admission of Mr. Story which immediately follows, of a single fact, refutes this opinion. He admits that if such State had remained independent, no State would have had any legal right to reclaim a fugitive slave from any other State, where slavery did not exist. Therefore by his own admission, the question of security to slaves, even if there had been no clause in relation to their recapture in the Constitution, would have been precisely the same, as it would have been if no Union had been formed. Any concession therefore made in the Constitution was a gratuity, an additional security, to what they would have had, as independent States out of the Union.

I deny that there is any evidence in history, or elsewhere, to show that this clause had reference, exclusively, to slaves. It was meant to include, and did include, as well apprentices and persons, of whom there was then existing a class, held to service for a term of years to pay their passage money from Europe, as slaves. The clause was made to include "all persons held to service." That it was intended to include persons held to service for life, I admit. That it was intended to recognise and afford national protection to slavery, I deny. Mr. Madison says the word slavery was carefully excluded from the Constitution by the framers of the instrument, lest by its insertion they "should seem to give countenance to the idea that there could be property in man."

I do not choose to rest either upon a mere denial of the assertion of Mr. Story's opinion in relation to this clause of Art. 4., that "its true design was to guard against the doctrines and principles prevalent in the non-slave holding States, by preventing them from intermeddling with, or obstructing or abolishing the rights of the owners of slaves." I have shown the absurdity of this affirmation, by barely alluding to the fact that there were no non-slave holding States at that time in the confederation. Slaves were held in every State of the original thirteen. Massachusetts I know, it is said, does not recognize the legal existence of slavery at as late a date as the adoption of the constitution. She held that such a bill of rights as adopted both by herself and Virginia, abolished and prohibited slavery. But slavery in fact existed even in Massachusetts; and its existence was not questioned in either of the other States. I do not however rest upon a bare denial of the affirmation, as made by the Court. I affirm, as to the sense and sentiment of the assertion; that it is untrue in fact, that the design of inserting clause 3, Sec. 2, Art. 4, of the constitution, was to guard and protect the principal slave holding States, "against the doctrines and principles prevalent" in the northern States. And I will attempt to sustain my affirmation by "contemporaneous history;" and by such references to facts, as shall be satisfactory for that purpose.

It is well known that at the adoption of the constitution, a large majority of all the slaves in the States were in Virginia.

Shortly after the Declaration of Independence, strenuous efforts were put forth by leading men in

Virginia, in Pennsylvania, and other States, for the abolition of slavery in all the States. An abolition society was formed, of which Benjamin Franklin was President, and to aid the object of which, Mr. Jefferson and other distinguished friends of liberty lent their heartiest co-operation. Massachusetts, Pennsylvania, and Connecticut, and perhaps one or two other States had succeeded by their respective legislatures in passing prospective laws for emancipation. Virginia and New York had each made strenuous efforts in their legislatures in 1785, to pass similar laws, but in each of those legislatures the bill was then defeated. The efforts of those intent upon abolishing slavery in Virginia were resolutely and vigorously put forth for the successful accomplishment of the measure. The most prominent men in Virginia were earnestly engaged in trying to procure the earliest practicable passage of an act for the abolition of slavery, similar to the acts passed by Pennsylvania and Massachusetts. Thomas Jefferson, James Madison, and other names of note in that State, were among the leaders of the enterprise. Virginia had adopted a bill of rights, containing a declaration "That all men are by nature equally free and independent, and have certain inherent rights of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety,"—drawn by the same hand that drew the Declaration of Independence, and containing the same noble sentiments. And when Virginia, by her delegates, came into convention for the adoption of a constitution, she came with this bill of rights in her hand: and her delegates in that convention were known to be decidedly and earnestly engaged in urging forward the abolition of slavery at home. The same men who sat in convention succeeded at the very next legislature of the State of Virginia in bringing forward a bill for the abolition of slavery in that State. The delegation of Virginia in the convention framing the constitution, it will be remembered voted against Gen. Pinckney's motion to so amend clause 1, section 9, article 1, of the constitution, so as to defer abolishing the slave trade from the time first mentioned—1800—until the year 1808. And Mr. Madison opposed the amendment, and all delay and said: "Twenty years will produce all the mischief that can be apprehended from the liberty to import slaves. So long a term will be more dishonorable to the American character than to say nothing about it in the constitution." Contemporaneous history shows that Virginia, at the time of adopting the constitution, by her delegation, unanimously to the last, voted with the delegates of Pennsylvania against deferring the time for abolishing the importation of slaves; and that the Northern States, Massachusetts, New Hampshire, and Connecticut, voted for its continuance until 1808. Virginia had at that time a State constitution, in the first clause of which was a complaint against "the inhuman use of the royal negative in refusing that State permission to exclude slaves by law, enumerated among the reasons for separating from Great Britain. Judge Tucker, an eminent statesman and jurist, Professor of Law in the University of William and Mary, had published the doctrine in that State; and without encountering any opposition; that it could be demonstrated that a state of slavery was wholly incompatible with the principles of our government, and of that revolution upon which it is founded. He termed slavery "the bitterest draught that ever flowed from the cup of affliction;" and declared it to be the imposition of a

grievance upon our fellow men, ten thousand times more cruel than the utmost extremity of those grievances and oppressions, of which we complained, imposed by Great Britain upon the Colonies.

Is it not, then, absurd to suppose that Virginia, entertaining and expressing stronger anti-slavery sentiments than almost any State of the thirteen, her delegates then in convention urging the immediate abolition of the Slave trade, voting for it with Pennsylvania and Delaware, and one or two other States; but voted down in her wishes for its immediate abolition, by the States of Massachusetts, New Hampshire, Connecticut and the other States—to suppose that Virginia, wished and required an express constitutional provision to guard against the doctrines and principles which she herself by every eminent son of the old Dominion cherished, and boldly asserted, in her university, in her courts of justice, and in her Legislature; and which were emblazoned on her bill of rights, and contained in the first clause of her constitution?

At the time of the formation of the constitution it was understood among the delegates of the Convention, and by the States, that slavery should be gradually but certainly abolished by each and all of the States. And the constitution was framed and adapted to that implied agreement.

In support of the foregoing proposition I will briefly advert to a few "lights and aids of contemporary history."

The Declaration of Independence was adopted, not hypocritically, but honestly, by each and every State, as the political sentiment of each State, as well as a national sentiment.

The Abolition Society, with Benjamin Franklin as President, met a hearty support, and no opposition in a single State. Pennsylvania, Massachusetts and perhaps some other States, had already passed laws for a prospective abolition of slavery.

Virginia and New York had both made efforts within about two years previous, to pass similar laws; and both States having been defeated, were then engaged to renew the effort to get such laws passed. And shortly after the adoption of the constitution, and the same year; both those States again brought forward bills in their respective legislatures, for the abolition of slavery. New York succeeded. Virginia, owing in part if not entirely to the absence of Mr. Jefferson, again failed to get the bill, introduced for the abolition of slavery, passed. This last failure was some two years after the formation of the constitution of the United States. The delegates of Virginia voted in convention for the earliest abolition of the slave trade; and refused to have the word "slave" inserted in the instrument.

Mr. Madison in No. 42 of the Federalist, page 228, written by him in 1788, uses the following language upon the subject: "It were doubtless to be wished that the power of prohibiting the importation of slaves, had not been postponed until the year 1808, or rather that it had been suffered to have immediate operation. * * * It ought to be considered as a great point gained in favor of humanity that a period of twenty years may terminate forever within these States a traffic which has so long and so loudly upbraided the barbarism of modern policy. * * * Happy would it be for the unfortunate Africans if an equal prospect lay before them of being redeemed from the oppression of their European brethren." And this sentiment was expressed by Mr. Madison in one of a series of essays, written by himself upon the constitution, for the perusal of all the States, prior and in relation to the adoption of the instrument.

Slavery and just before forever excluded by almost a unanimous vote of the delegates of all the States from

the entire North western territory; that being all the territory then owned by the United States. The provisions of the ordinance so limiting slavery and tending to terminate its existence, it is well known was drawn by Mr. Jefferson, and met the approbation of the most distinguished statesman of Southern, as well as Northern States.—But without referring to individual expressions at the period of the adoption of the constitution, in favor of the proposition; I refer to the fact of the entire absence of the expression of sentiment in any of the essays in the Federalist, or any other public papers of the kind, in favor of the continuance, or opposing the future abolition of slavery.

Add to the foregoing the important fact that the Declaration of Independence had been adopted by all of the States, and was then professed as the sentiments of the people; and had not been repudiated, or even controverted by any State, and it must be admitted that the "lights and aids of contemporary history fully sustain my proposition"—that there was, at the time of the adoption of the Constitution, a general understanding among the people, and an implied agreement that slavery should be abolished by all the several States.

So far, therefore, from any guaranties in favor of slavery being thereby discovered, when best understood, contemporary history teaches that the subsequent extension and present existence of slavery, are really violations of good faith on the part of those States which have neglected to abolish it in accordance with that implied agreement which existed at the adoption of the Constitution.

And I here insist, in conclusion of my remarks upon that case, that this decision, made, as it is, by a departure from the Constitution, and upon an imagined state of facts, ought to be regarded as a historical, rather than a legal decision.

If a similar question were to be again submitted to that court, it would be not only within the power of the court, but it would be the sworn duty of the court, upon being convinced that the law was not correctly expressed in this decision, to pronounce it differently. The legislative powers conferred upon Congress are invested by the Constitution alone. No decision of any court can either enlarge or in the least abridge those constitutional powers.

No such legislative powers as those exercised by Congress in enacting either the alien and sedition laws, or to incorporate a United States Bank, were ever vested in Congress by the Constitution. The exercise of such powers in those cases was an assumption on the part of Congress, without warrant by any provision contained in the Constitution, and hence the firm, constant and long continued opposition of all strict constructionists, from Mr. Jefferson and Mr. Madison down to the present time, to such exercise of power on the part of Congress.

The power "to provide for calling forth the militia to execute the law of the Union, suppress insurrection and repel invasion," in addition to the power "to declare war, grant letters of marque and reprisal, and make rules concerning captures on land, and water," was expressly vested in Congress by the Constitution. Those favorable to the centralization of the largest powers in the Federal Government insisted that in a case where it was deemed expedient to pass laws for the forcible expatriation of foreigners, it would not be an unwarrantable extension in construction of language to regard these grants of power to Congress as including the case of legislating for removal of Aliens in certain cases mentioned. And the power was so assumed; the law enacted by Congress and declared constitutional by the judiciary.

I have thus alluded to those laws over which this

political controversy was first awakened, to show the fairness of the sentiment expressed by eminent men in relation to those laws, being applicable to that of a law passed by Congress upon the subject matter of Clause 3, Sec. 2, Art. 4. There is this difference in the two cases. The "war power" is in express language by the Constitution vested in Congress; only the opponents to the "Alien law," or those who denied the power of Congress to pass that law, objected to the power being used in any quarter, extent or for any other purposes herein clearly expressed by the common sense of the language of the Constitution. But as to Clause 3, Sec. 2, Art. 4, no power is given to the general government; nor to any department, or officer thereof in relation to that subject.

It is therefore evident that it requires a much wider digression from the doctrine of strict constitution to sustain any congressional legislation upon the subject of fugitives from service than to sustain the constitutionality of either the "Alien law" or the "Sedition law." The principle is however, involved in all these cases, of the right of Congress to exercise under the Constitution assumed legislative powers, upon subjects where no power is delegated by the language and terms of the instrument. The arguments used by the advocates of the exercise of those Federal legislative powers have always been, and still are the same; and may be expressed in one word; expediency. The arguments of the opponents of this exercise of assumed and undelegated powers on the part of the Federal government always has been, still is, and always will be the same; and may be expressed in one word; the Constitution. There was a difference of opinion existing at the formation of the general government, among those who had evinced equal patriotism throughout the revolution. There were those who throughout the preservation of our independence required a strong Federal government invested with supreme and almost general power over the States. Others insisted upon preserving the democratic idea of a government emanating as directly from the people as practicable; and preserving the sovereignty of the States respectively, by investing the general government with only certain specified powers to be exercised, as particularly provided by the Constitution for the common defence, and welfare of the citizens of all the States. A general government of limited powers was formed. The constitution as we have seen, when adopted, and as adopted and accepted by the States, vested only such powers in Congress as granted by the instrument; and in addition to the limitations of such grant, the constitution so granting such limited powers, contained the express reservation of all powers not therein delegated. The democratic idea was realized in the formation of the Constitution; and the careful limitations and restrictions inserted in the instrument would seem to a reader, and were so understood at the time by the most cautious statesmen, to be ample safe-guards against the consolidation of absolute sovereign power in the general government. The constitution upon its face was an instrument executed by sovereign States in the nature of a grant of certain expressed legislative powers to Congress; expressly reserving all others. It was an instrument when executed subject to the same rules of construction as to the extent and terms of the grant as a deed of conveyance. It was incumbent on the grantee to show title. If a reasonable doubt existed, that doubt must permit a decision in favor of the grantee. Mr. Madison in remarking upon the powers delegated by the Constitution to the general government, prior to its adoption by the States, in chap. 45, page 252, of the *Federalist*, says: "The powers delegated by the proposed constitution to the Federal government, are few

and defined. Those which are to remain in the State governments are numerous and indefinite."

It was under this Constitution which Mr. Madison, who drew the instrument, thought so clearly defined the few powers granted to the General Government, that Congress, shortly after its adoption, assumed to enact the law entitled "An act respecting alien enemies," providing for the forcible removal, by marshals or deputy, marshals of the courts, without trial, certain foreigners, from the United States. I do not allude to the circumstances under which this high power was to be exercised. The act had the form of law, and must have been thought expedient by the majority of both houses of Congress, or it could not have been passed. The act itself purports to be an exercise of powers vested in Congress in relation to war. But the legislation was in time of peace. Yet the "reasoning" of the Legislature seems to have led them to infer that, in as much as the Constitution had given them the power "to declare war," "to raise and support armies," and other powers upon the same subject, it would be expedient to enact the law mentioned. And this assumption of legislative power was not only sustained by the administration, and a majority of Congress, but a judiciary was also then founded to uphold the law as constitutional.

Mr. Jefferson and Mr. Madison both concurred in regarding such assumed powers, on the part of the Federal Government, as a dangerous usurpation; and maintained firmly and constantly the unconstitutionality of the laws. At the ensuing Legislature of Kentucky, a series of resolutions, drawn by Mr. Jefferson, were introduced, expressive of the sentiment of himself, Mr. Madison and others concurring with them in sentiment, and from which I here read, to show the sentiment of the opposition to this assumed power by the Federal Government:

"Resolved, That the several States comprising the United States of America, are not united on the principle of unlimited submission to the General Government; but that by compact under the style and title of a Constitution for the United States, and amendments thereto, they constituted a General Government for special purposes, delegated to that government certain definite powers, reserving each State to itself, the residuary mass of right to their own self-government; and that whenever the General Government must assume undelegated powers, its acts are unauthorized, void, and of no force; that to this compact each State acceded, as a State and as an integral party; its co-States forming as to itself the other party; that the government created by this compact was not made the exclusive or final judge of the extent of powers delegated to itself, since that would have made its discretion, and not the Constitution, the measure of its powers; but that, as in all other cases of compact among parties having no common judge, each party has an equal right to judge for itself, as well of infractions, as of the mode and measure of redress."

And after still further asserting the principles, which every strict constructionist has ever since continued to maintain, Mr. Jefferson, in his fourth resolution, asserts the following, in relation to that law which I here read:

"Resolved, That alien friends are under the jurisdiction and protection of the laws of the State wherein they are; that no power over them has been delegated to the United States, nor prohibited to the individual States, distinct from their power over citizens; and it being true as a general principle, and one of the amendments to the Constitution have also declared "that the powers not delegated to the United States by the Constitution, nor prohibited to the States, are

reserved to the States respectively, or to the people," the act of Congress of the United States, passed on the 22d day of June, 1798, entitled "An act concerning aliens," which assumes power over alien friends not delegated by the Constitution, is not law, but is altogether void, and of no force."

This was the sentiment of Mr. Jefferson, expressed of one of the first exercises of assumed powers by Congress, and maintained by him in opposition to the expressed sentiment of the Legislature, Executive and Judicial Departments of the Federal Government. But wherein, by the terms of the Constitution, is it not equally true of persons in any particular State, owing service in another State, that so far as jurisdiction and laws are operative upon any person in the State where they are residing, they too are subjects of the legislative power of the State in which they reside?

The following extracts, from the resolutions drawn up by Mr. Madison, as introduced in the Legislature of Virginia at its next session after the passage of these laws by Congress, show the early grounds occupied by strict constructionists in that State:

"Resolved, That the General Assembly of Virginia doth explicitly and peremptorily declare that it views the powers of the Federal Government as resulting from the compact to which the States are parties, as limited by the plain sense and intention of the instrument constituting the compact; as no further valid than they are authorized by the grants enumerated in that compact; and that in case of a deliberate, palpable and dangerous exercise of other powers, not granted by the said compact, the States, who are parties thereto, have the right and are in duty bound to interpose for arresting the progress of the evil, and for maintaining, within their respective limits, the authorities, rights, and liberties appertaining to them.

"That the General Assembly doth particularly protest against the palpable and alarming infractions of the constitution, in the two late cases of "Alien and Sedition" acts, passed at the late session of Congress; the first of which exercises a power no where delegated to the federal government, and which by uniting legislative and judicial powers to those of executive, subverts the general principles of a free government, as well as the particular organization and positive provisions of the Federal Constitution.

"Resolved, That the General Assembly doth also express its deep regret, that a spirit has, in sundry instances, been manifested by the general government, to enlarge its powers by forced constructions of the constitutional charter which defines them; and that indications have appeared of a design to expound certain general phrases, (which having been copied from the very limited grant of powers, in the former articles of confederation, were the less liable to be misconstrued,) so as to destroy the meaning and effect of the particular enumeration which necessarily explains and limits the general phrases; and so as to consolidate the States by degrees into one sovereignty, the obnoxious tendency and inevitable result of which would be to transform the present republican system of the United States into an absolute, or at least a mixed monarchy."

These resolutions were adopted by the Legislature of Virginia and transmitted to every other State in the Union. The New England States seem to have received them with strong disapprobation and prejudice; and almost unanimously to have adopted, in their respective legislatures, resolutions expressive of the well known counter sentiments of the then existing administration. But it will be remarked as to the resolutions of each of the States dissenting from the resolutions of Virginia and Kentucky, there is no fair attempt in a

single instance to refute the doctrines contained or the facts set forth. The counter resolutions of those legislatures express the strongest attachment for the Union, and their fears of such disturbing influences as the bold and unanswerable resolutions submitted by Jefferson and Madison. Massachusetts resolved "that the several States are connected by a common interest which ought to render the Union indissoluble, and that (the State of Massachusetts) will always co-operate with its confederate States, in rendering that Union productive of mutual safety."

The Legislature of Rhode Island, in considering the resolutions of Virginia, resolved against "hazarding an interruption of the peace of the States by civil discord," and "that, in their private opinions, those laws (the Alien and Sedition acts,) are within the powers delegated to Congress, and promotive of the welfare of the United States."

The Legislature of the State of New Hampshire resolved "that they will support the government of the United States in all measures warranted by the constitution;" and "that if the Legislature of New Hampshire, for mere speculative purposes, were to express an opinion on the acts of the general government, commonly called the 'Alien and Sedition bills,' the opinion would unreservedly be that these acts are constitutional, and in the present critical situation of our country are highly expedient."

The state of Vermont passed the following resolve: "Resolved, That the General Assembly of the State of Vermont do highly disapprove of the resolutions of the General Assembly of Virginia, as being unconstitutional in their nature, and dangerous in their tendency. It belongs not to State legislatures to decide on the Constitutionality of laws made by the General Government; this power being exclusively vested in the judiciary courts of the Union."

The General Assembly of the state of Connecticut holden at Hartford, in that state, in May 1799, passed the following in relation to the subject of the Virginia resolutions:

"Resolved, That this Assembly views with deep regret, and explicitly disavows the principles contained in the aforesaid resolutions; and particularly the opposition to the 'alien and sedition acts;' acts which the Constitution authorized; which the exigency of the country rendered necessary; which the constituted authorities have enacted, and which merit the entire approbation of this assembly. They, therefore, decidedly refuse to concur with the legislature of Virginia in promoting any of the objects attempted in the aforesaid resolutions."

The legislature of New York also resolved that the resolutions of the legislatures of Virginia and Kentucky were pernicious in sentiment and doctrine, and repugnant to the Constitution of the United States, and the principles of the Union, and destructive to the Federal Government; and unjust towards the administration.

Such was the opposition that the sentiment of Jefferson and Madison in favor of strict construction, of the Constitution had to encounter from those who advocated such latitudinous construction as would authorize the exercise of powers by Congress not delegated.

Men of less ardent attachment to the true principles of government might have been expected to yield to such an opposition as their resolutions seemed at once to encounter from the State legislatures as well as the Federal government in all its departments. But the truth, and vital importance to the liberties of the people involved in the resolutions were too clearly seen and appreciated by them, to be abandoned before any opposition.

At the next session in 1799-1800, of the legislature of Virginia, we find the same resolutions together with those alluded to, made in reply to them by the legislatures of other states, again called up and carefully considered, and a report written as it is said, by Mr. Madison, was made by a committee upon those resolutions.

Mr. Madison in this report goes into a critical examination of the resolutions adopted at the previous session and by reasoning unanswerable, as it seems to me, defends the doctrine of strict construction. The position insisted upon by Madison in that report, is that the American Congress has only the necessary power proper for carrying into execution all express powers vested by the constitution in the General Government or in some department or officer thereof.

"Whenever therefore," he remarks, "a question arises concerning the constitutionality of a particular power, the first question is, whether the power be expressed in the Constitution. If it be, the question is decided. If it be not expressed, the next inquiry must be whether it is properly an incident to an express power, and necessary to its execution. If it be it may be exercised by Congress. If it be not, Congress CANNOT EXERCISE IT."

In another paragraph is the following: "Here again it will be proper to recollect that the federal government being composed of powers specifically granted, with a reservation of all others to the state, or to the people, the positive authority under which the sedition act could be passed must be produced by those who assert its Constitutionality. In what parts of the Constitution, then, is this authority to be found?"

The doctrine of strict construction was the real ground of difference existing between Mr. Jefferson's and Mr. Hamilton's views, and is maintained in the able opinion given at that time by Mr. Jefferson, as Secretary of State, respecting the power to charter a Bank.

"I consider," he says, "the foundation of the Constitution, as laid on this ground, that all powers not delegated to the United States by the Constitution, nor prohibited by it to the States, as reserved to the States, or the people. To take a single step beyond the boundaries thus specially drawn around the power of Congress, is to take possession of a boundless field of power, no longer susceptible of any definition—the incorporation of a Bank, and the power assumed by this bill, have not in my opinion been delegated to the United States by the Constitution."

No one can fail to observe at once the difference existing on this question of Constitutional power, between the views maintained by Mr. Jefferson and Mr. Madison on the one side, and the views of Mr. Hamilton and the friends of that administration upon the other side. It was a political difference of opinion, and one tending to widely different results. And, perceiving this, we are not surprised at the fact, that a judiciary entertaining the same political views with the administration of Mr. Adams, should sustain the Constitutionality of the act to incorporate the Bank of the United States, as well as the Alien and Sedition acts. Adams and Hamilton, it cannot be doubted, honestly thought the powers of the National Government sufficiently extensive to authorize such legislation. And there can be as little doubt on the other hand, that Jefferson and Madison honestly thought that Congress possessed no such power; and that the liberties of the citizens of these several States, required that the National Government should not be permitted to exercise any such assumed and undelegated powers.

It is not material to determine the cause of this difference. The fact is well understood, that the rad-

cal views so enthusiastically cherished by Mr. Jefferson, of sustaining and carrying into the structure of government, the principles set forth in the Declaration of Independence, and keeping the powers of government in the hands of the people, and leaving nearly all legislative power in the respective State legislatures, was regarded both by Mr. Adams and Mr. Hamilton, as a hazardous experiment. They seemed to regard that favorite idea as the "scilla" upon which the liberties of the country would be lost; while Jefferson and Madison seemed to regard Sovereignty, when taken from the people, whether lodged in a Parliament or Congress, as a "Charybdis," fatal sooner or later, to such a free and popular government as contemplated by the writer of the Declaration, and by the draftsman of the Constitution. The political school of Adams and Hamilton, feared that to give to the Federal government, only the express specified powers delegated by the language of the Constitution would leave it a government of too limited powers; and that the centripetal force of the Federal government, would be insufficient to withstand the centrifugal tendencies of the large popular rights and powers proposed to be left with the people and States.

Mr. Jefferson had read, and fully comprehended the political and philosophical sentiments of D'Alembert, Diderot and Rousseau. He perceived with a certainty, that admitted, in his own superior mind of no doubt, that the only just, firm and enduring basis of human government, consisted in the recognition of the sentiment of equality; and that government to be perfect and enduring, must arise as a social contract out of the recognition and maintenance of this sentiment.

Mr. Adams and Hamilton, equally desirous of the largest liberty that could be safely asserted and certainly maintained, in the organization of our government, seemed to think it dangerous to adopt any untried theory in its organization; without in a measure practically conforming to some approved precedent. A larger civil liberty was at that time enjoyed under the English government than any other existing, that had succeeded in Europe. And with a desire to avoid the evils, and to preserve the excellencies, that government was doubtless in their estimation regarded as a proper and necessary model for successfully conducting the administration of this.

This much I have thought worth while to remark upon the origin of that difference of political views upon which, at its inception certainly, the difference of opinion as to the powers of Congress under the constitution originated. This I have done to show more clearly that it never was the theory of Mr. Jefferson to have power removed further than absolutely necessary from the States. The constitution under the ordinary rules of construction, the same legal rules applicable to all written instruments, construed according to the expressed language of the text, confers all the powers upon the general government that Jefferson or Madison could consistently with their own theories, have ever consented to delegate to Congress.

The doctrine of strict construction of the constitution in determining the legislative powers of Congress, in the same sense maintained by Jefferson and Madison, has been maintained and insisted upon by those entertaining their political views down to the present time.

Mr. Jefferson, it is well known, if he did not himself write the resolution, gave his unqualified approval of the sentiment in the resolution adopted Nov. 14, 1799, by the Legislature of Kentucky, in relation to the exercise of assumed legislative power by the federal government. That sentiment is thus expressed:

"Resolved, That this Commonwealth considers the federal Union upon the terms and for the purposes specified in the late compact, as conducive to the liberty and happiness of the several States; that it does now unequivocally declare its attachment to the Union and to that compact, agreeable to its obvious and real intention, and will be among the last to seek its dissolution; that if those who administer the general government, be permitted to transgress the limits fixed by that compact, by a total disregard to the special delegations of powers therein contained, an annihilation of the State governments, and the erection upon their ruins of a consolidated government will be the inevitable consequence. That the principle and construction contended for, by sundry of the State Legislatures, that the general government is the exclusive judge of the extension of the powers delegated to it, stop nothing short of despotism, since the discretion of those who administer the government and not the constitution would be the measure of their powers."

Numerous expressions of the same sentiment with those already cited, are to be found expressed by Mr. Jefferson and Mr. Madison, upon this subject, of strict construction. I will, however, only refer to one more; that of Mr. Madison, contained in his message of March 3d, 1817, the last day of his administration. He had in his previous messages, particularly in his message of December 5, 1815, called the attention of the General Government to the importance of certain internal improvements, requiring a national jurisdiction, and national means; and suggested that any defect of constitutional authority to be encountered, could be supplied, in a mode which the constitution has "prudently pointed out," by amendment. But without any amendment of the constitution, Congress, in February, 1817, under the general power given in the constitution, to "regulate commerce among the several States," passed the bill entitled "an act to set apart and pledge certain funds for internal improvement," setting apart and pledging certain funds for constructing roads, canals &c., to facilitate the intercommunication of different States—the very object which Mr. Madison so much desired to see accomplished.

And of this act, after mature deliberation, Mr. Madison in that message says: "I am constrained by the insuperable difficulty I feel in reconciling this bill with the constitution of the United States, to return it with that objection, to the House of Representatives, in which it originated.

"The legislative powers vested in Congress are specified and enumerated in the 8th section of the first article of the constitution, and it does not appear that the power proposed to be exercised by the bill, is among the enumerated powers, or that it falls, by any just interpretation, within the power to make laws necessary and proper for carrying into effect those or other powers vested by the constitution in the government of the United States."

This exposition of the principles of construction applicable to the determination of the true legislative powers of Congress under the constitution, is in my judgment, entitled to more respect, than should be any number of decisions made by a judiciary—not upon the provisions of the constitution as expressed by its language—but as by "the reasoning of the court," from contemporaneous history, it ought to have been expressed.

Here is the opinion of the distinguished statesman and jurist, who himself drafted the instrument; was a most prominent member of the convention which discussed every provision of the constitution, and concluded to submit it, with the limitations precisely and plainly expressed by the words and lan-

guage of the instrument. If any contemporaneous history existed having any influence properly upon the subject, his judgment might have reasonably been expected to have been subject to such influence. A bill had been passed by Congress to carry out a favorite plan of his own, which only required his signature to become such a law as in his judgment, expediency and the best interests of the country seemed to require.

Under these circumstances, it was with every inclination and bias, if any could have existed in favor of the law, that Mr. Madison was called upon under his official oath to decide the question whether Congress had under the constitution, by a fair and honest interpretation of the instrument, to pass such a law. To determine this important question, Mr. Madison did not, it is true, recur to "the lights and aids of contemporaneous history," but confined himself to a critical examination of the constitution itself. The two provisions under which Congress derived the power, if it could be regarded as possessing it, seem, in Mr. Madison's mind, to have been the following:

That Congress shall have power—"to regulate commerce—among the several States," and also, to make all laws necessary and proper for carrying into execution the powers vested by the constitution in the General Government or any department thereof.

The precise question therefore, to which he directed his attention seems to be, is a bill to construct roads and canals, in order to facilitate and increase commerce among the States, by a fair exposition of the terms and language used, contained in the grant of power to regulate commerce among the several States? And secondly, does this law fall within that grant of power necessary and proper for carrying into execution the power held by Congress to regulate commerce? In determining these questions, Mr. Madison seems to have proceeded as an able jurist would, to determine the limit of an agent's authority, from the written instrument of the principle by which empowered to act. By a fair and reasonable construction of the language used, can the bill under consideration be regarded as a bill regulating commerce? seems to have been the only inquiry. And he expresses the result of his reflection upon the subject as follows: "The power to regulate commerce among the several States, cannot include a power to construct roads and canals, &c., in order to facilitate, promote and secure such a commerce, without a latitude of construction departing from the ordinary import of the terms." Here is recognized the same doctrine of strict construction, and the same strict practical application of it in defining and determining the limited powers of Congress, on the part of Mr. Madison while occupying the Presidential chair, which are expressed by the resolutions which he and Mr. Jefferson twenty years before, submitted for adoption to the Legislatures of Virginia and Kentucky, in relation to the Alien and Sedition laws.

And here to illustrate still more clearly how true it is that this difference of construction of the constitution, having in its tendency the different result of, on the one hand, limited and strictly defined powers; and on the other unlimited and consolidated powers in the federal government; I will read from an opinion of an eminent jurist belonging to the opposite political school.

About two years after Mr. Madison had expressed the opinion from which I have read, of the limited powers of Congress under the constitution, the case of *McCulloch vs. the State of Maryland*, came on for hearing before the Supreme Court. The case involved the question of the power of Congress to pass the law incorporating the Bank of the United States; a

question of like character and importance, and obviously subject to the same rule of decision, as that decided by Mr. Madison. The opinion of the Court in this case, was delivered by Chief Justice Marshall, whose political views coincide, like Mr. Story's, with Mr. Hamilton's. Now in this case, just as in the case respecting which Mr. Madison gave the opinion read, there is submitted for decision, the simple question, is the power delegated by the constitution to Congress to pass the law? Mr. Madison, as we have seen, to determine the question, would have taken up the constitution and referred to the particular grant of power under which the law was enacted, and have determined whether the law falls by a reasonable and just interpretation of the language of the provision of the constitution, within that power.

But I will now read from the reasoning of C. J. Marshall:

"Although, among the enumerated powers of government, we do not find the word 'Bank.' or 'Incorporation,' we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are entrusted to its government. It can never be pretended that these vast powers draw after them others of inferior importance, merely because they are inferior. Such an idea can never be advanced. But it may with great reason be contended that a government entrusted with such ample powers on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be entrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution"—what power being given? How is it to the interest of the nation to facilitate its execution? And supposing it to be the interest of the nation, does that show a legislative power to incorporate a bank delegated by the Constitution? Would still have remained to be answered in the view taken of the same subject by Mr. Jefferson.

The most casual attention given to the argument of Mr. Madison or Mr. Jefferson, on the one hand and to the arguments of Mr. Hamilton, C. J. Marshall or Mr. Story on the other, gives the impression of a political difference of opinion. The general government seems to be regarded by Jefferson and Madison as the special agent of the States, and people, invested with limited powers, particularly expressed in the constitution; and as absolutely restricted to the exercise of only those powers; as ever an individual agent was restricted by the special power of attorney of his principle. And hence we find Mr. Madison when impressed with the importance of legislation by Congress upon a subject for which the constitution had not provided, recommending another amendment of the instrument. And we have seen when a similar subject was presented to C. J. Marshall, he proceeds by argument to show, not that Congress possesses among its delegated powers, the power to incorporate a bank, but that the general government is invested with other more sovereign powers than such a power, that the sword and the purse are entrusted to the government. He seems to assume for it general sovereign powers, and advances at once to the assumed inference that the power being given, it is the interest of the nation to facilitate its execution. But who does not see that to facilitate the extension of power, the conclusion arrived at by the court is quite a different thing from the power conferred by the constitution, to regulate commerce among the several States?

The truth is, all those who departed from and were

opposed to the doctrine of strict construction, were opposed in sentiment to the idea of so limited powers in the federal government as such construction necessarily required. And hence those entertaining such views, whether in the legislative or judiciary, have constantly, from the very adoption of the constitution, inclined to give a kind of common law power to the federal government as cumulative to its constitutional delegated powers.

The question of the power of Congress to incorporate the Bank of the United States, depending as it did upon the two different views entertained of ascertaining the limitation of the powers of Congress was uniformly decided in favor of the exercise of that power by the judiciary. In July, 1832, more than forty years after the first act of incorporation was passed, Congress passed a bill for re-chartering the Bank. The assumed power of Congress to charter a Bank had then been exercised for nearly half a century, and had on all occasions by the judiciary been sustained. The friends and advocates of large and unrestricted powers in the federal government insisted that the Constitutional power of Congress to enact such laws, had been solemnly adjudged and sanctioned by the judiciary, and the question was no longer an open one. Under these circumstances, the bill was submitted to President Jackson for his approval and signature. And I will here refer to a few sentiments contained in his Veto message, communicated to Congress on that subject July 10th, 1832, in which he says:

"It is maintained by the advocates of the Bank, that its Constitutionality in all its features ought to be considered as settled by precedent, and by the decision of the Supreme Court. To this conclusion I cannot assent. Mere precedent is a dangerous source of authority, and should not be regarded as deciding questions of Constitutional power, except where the acquiescence of the people and States can be considered as well settled."

"If the opinion of the Supreme Court covered the whole ground of this act, it ought not to control the coordinate authorities of this government. The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution, swears that he will support it as he understands it, and not as it is understood by others. It is as much the duty of the House of Representatives, of the Senate, and of the President, to decide upon the Constitutionality of any bill, or resolution, which may be presented to them for passage or approval, as it is of the Supreme Judges when it may be brought before them for judicial decision. The opinion of the Judges has no more authority over Congress, than the opinion of Congress has over the Judges; and on that point the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve."

"Nor is our government to be maintained, or our Union preserved by invasions on the rights and powers of the several States. In thus attempting to make our general government strong we make it weak. Its true strength consists in leaving individuals and States as much as possible to themselves; in making itself felt, not in its power, but in its beneficence; not in its control, but in its protection; not in binding the States more closely to the center, but leaving each to move unobstructed in its proper orbit."

Mr. Van Buren also fully recognized and asserted the doctrine of strict construction, in his Inaugural Message he says: "For myself therefore, I desire to de-

clear that the principles that will govern me in the high duty to which my country calls me, is a strict adherence to the letter and spirit of the constitution as it was designed by those who framed it. Looking back to it as a sacred instrument, carefully and not easily framed, remembering that it was throughout a work of concession and compromise; viewing it as limited to national objects; regarding it as leaving to the people and the States all power not explicitly parted with, I shall endeavor to preserve, protect and defend it, by anxiously referring to its provisions for direction in every action."

President Polk also maintained the sentiment that the usefulness and permanency of the government, and the happiness of the people were best promoted by "carefully abstaining from the exercise of all powers not clearly granted by the constitution."

I will now read from the opinion of an eminent jurist, Chancellor Walworth, a strict constructionist, on the question upon which Mr. Story's opinion was given in the *Prigg* case, the constitutionality of the law of 1793. The case of *Jack vs. Martin* (14, Windell 507,) was decided in the Supreme Court of Errors of the State of New York, at the December term, 1835. We have seen how even as learned a jurist as Mr. Story by entertaining the political sentiment of Mr. Hamilton, could resort to the aids and lights of contemporary history "to derive this power under the constitution." The following is "the reasoning" of Chancellor Walworth in deciding precisely the same question.

"I am one of those" (says the Chancellor,) "who have been in the habit of believing that the State Legislatures had general powers to pass laws on all subjects, except those in which they were restricted by the constitution of the United States, or their own local constitutions, and that Congress had no power to legislate on any subject, except so far as the power was delegated to it by the constitution of the U. States. I have looked in vain among the powers delegated to Congress by the constitution for any general authority to that body to legislate on this subject. It certainly is not contained in any grant of power; and it does not appear to be embraced in the general grant of incidental powers contained in the last clause of the constitution relative to the powers of Congress Const. Art. 1, Sec. 8, Sub. 17. The law of the United States respecting fugitives from justice and fugitives from service is not a law to carry into effect any of the powers expressly granted to Congress or any other power vested by the constitution in the government of the United States or any department or officer thereof. It appears to be a law to regulate the rights secured to the individual States, or the inhabitants thereof by the second section of the fourth article of the constitution; which section like the tenth section of the first article merely imposes a restriction and a duty upon other States in relation to such rights, but vests no power in the federal government or officer thereof, except the judicial power of declaring and enforcing the rights secured by the constitution.

There is here observable the same difference between "the reasoning" of Walworth and Story upon this constitutional question, the power of Congress under the constitution, to enact the fugitive law, that we have seen between "the reasoning" of Jefferson and Marshall, as to the power of Congress to enact the Bank law. "The reasoning" of Jefferson and Walworth, to ascertain whether or not a particular power is delegated to Congress under the constitution, consists simply in recurring to the instrument, and critically examining its provisions with an impartial and unbiased judgment, and in the absence of such power delegated by the language of the constitution, they decide that fact accordingly.

The reasoning of Mr. Story and Mr. Marshall only commences at that point. Finding no power expressed in the constitution to charter a Bank, Mr. Marshall recurs to other powers to show the sovereignty of the government and goes about to show the federal government has power to levy taxes and declare war; and asserts that government is entrusted with the purse and sword of the nation, and therefore "must be entrusted with ample means," and may incorporate a bank. In like manner, finding no such power expressed in the constitution; instead of saying with Walworth that no power is vested by the constitution in Congress to enact a fugitive law, and recognizing the provisions of the constitution as the limit of the powers of Congress; Mr. Story institutes a process of reasoning from what he imagined history to prove, that the power to enact a fugitive law ought to have been delegated by the constitution to Congress; and claiming to have shown this by "the reasoning of the court" from such hypothesis, he pronounces Congress clothed with authority to pass the law.

The bill incorporating a national bank was passed February, 1791, and a judiciary of the same political sentiment with the majority of the Congress that passed the law, decided it constitutional. A Congress of the same political sentiment, passed the several laws known as the Alien and Sedition Laws, which were further removed from any power, under the constitution than the chartering of a bank; and these laws, too, although regarded as unconstitutional by every strict constructionist, were sustained by a judiciary that entertained Mr. Hamilton's opinion. A Congress of the same political sentiment also passed the fugitive law of 1793—a law even further removed from any provision of the constitution than the Alien and Sedition laws. And this law, too, although by an eminent jurist, of Mr. Jefferson's political sentiment as to the construction of the constitution, was, in 1835, decided unconstitutional, as we have seen, has, like the law incorporating a bank, and the Alien and Sedition laws, been sustained by a court of the same political sentiment with the Congress enacting the law.

In justice to the opinion of the Supreme Court, it ought, however, to be remarked that if the constitutionality of the fugitive law had come before them for decision at as early a day as did that of the Alien and Sedition laws, it is hardly probable they would have sustained the constitutionality of the law. The court not having been called upon for their opinion directly upon the question until 1842, they seem to attach great importance to the fact of the law having remained so long upon the Statute book: as well as the fact of there having been no particular opposition to its passage. In the judgment of a strict constructionist, obviously neither of these considerations would have any weight upon finding no power was, in fact, delegated by any provision in the constitution to Congress, to pass any law upon this subject. Yet, if the court had examined the circumstances of the case in these two particulars, they could not have received much aid from them to sustain the singular decision which we have already examined.

The fugitive law of 1793 was passed under the following circumstances. In the year 1791, about two years after the adoption of the Constitution, the Governor of Virginia received a demand from the Governor of Pennsylvania for the surrender of three persons, who had been indicted in Pennsylvania for kidnapping a negro and carrying him into the State of Virginia. Congress had, at its first session after the adoption, in accordance with the power delegated in section one, article four, passed the general law of May 26, 1790, prescribing the manner in which public acts, records, &c., of one State might be proved; and giving full effect to

copies so proved, in other States. There was, therefore, no difficulty in making proof, by a certified copy of the indictment, in a case under clause two, section two, of article four, providing that "a person charged in any State, with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority from which he fled, be delivered up to be removed to the State having jurisdiction of the crime."

Yet the Governor of Virginia hesitated about complying, and finally referred the matter to the Attorney General of that State, who advised that the demand ought not to be complied with—as has of late years frequently happened upon such applications. In his elaborate opinion, the Attorney General, among other objections, suggested that there was no law passed as yet by Congress, pointing out, in detail, the modes of proceeding to comply with that compact in the Constitution. The Governor of Virginia, in his reply, stated as the reason of his refusal, that opinion, and expressed his regret that Congress had not passed a law defining more particularly a rule of procedure in such cases. The Governor of Pennsylvania seems at once to have adopted this ingenious ruse of the Attorney General as a sound legal argument, and applied for legislation at its next session on the part of Congress. A committee thereupon reported the bill as it now appears in the act of February 12, 1793, entitled "An act respecting fugitives from justice, and persons escaping from the service of their masters." The bill was made to embrace both the second and third clauses of section two, article four, and passed, it seems, without any discussion, and probably very little attention. At any rate there is no evidence that this legislation encountered any other legal opinion than that of the ingenious Attorney General of Virginia. And if it had been discussed and opposed, it is by no means certain that a Congress which could so construe their own legislative powers, as to pass laws incorporating a United States Bank, and the Alien and Sedition laws, would even have doubted their right or power to pass such a bill.—The circumstances, then, under which the law of 1793 was passed, so far from being a presumption in its favor, would go far to explain how an act so manifestly transcending the legislative powers of Congress vested under the Constitution, came to be passed. Neither can the length of time which the law has remained be urged as an argument in favor of its constitutionality. The Supreme Court in 1842, when for the first time called upon to decide as to the constitutionality of the law, virtually decided that all of the act relating to fugitives from justice is unconstitutional, by deciding what every lawyer knows, that State officers cannot, by virtue of their offices, be made executive officers of a law of Congress. And yet this law, in all that relates to fugitives from justice, has no executive officer to execute the order, who is in any sense an officer of the Federal Government. The law exhibits the absurdity of converting Governors of States into Constables of the Federal Government! Who, before, ever heard of a law which had no provision by which it could be enforced? Yet the fugitive law of 1793, in all that relates to its execution against fugitives from justice, and in all that part which relates to fugitives from service, requiring the action of a magistrate of any county, city, or town corporate, in its execution is such a law. And it is admitted and held, I believe, by the judiciary, so far forth, as it assumes to convert State officers into officials of the General Government, to be sham legislation, and utterly void and of no effect.

There is, then, no argument, in fact, on this point, upon which Mr. Story seemed so much to rely, that the constitutionality of the law of 1793 had been passively acquiesced in by State Legislatures and courts.

For who does not see that that argument goes to the whole law in all of its parts. Yet Mr. Story is forced to say, such passive acquiescence cannot cure those absurdities of the law; and himself admits the unconstitutionality of the greater part of the whole act; and, as it happened, the very points and parts of the law which had received the most practical use, and so the highest sanction from passive acquiescence of State authorities.

I will now consider the argument of necessity, urged in favor of sustaining the power of Congress to legislate upon the subject of fugitives from service. This has always, as we have seen, been the favorite argument of the Hamilton school of politicians. It was used to justify Congress in passing the Bank laws, and the alien and sedition laws. The doctrine of strict construction does not, as I have shown from the authority of Jefferson and Madison, and others, recognize this argument of necessity as legitimate, in any case where shown. The strict constructionists say as Mr. Madison did, when he found there was no power conferred by the Constitution for such legislation as he desired, and thought necessary—let the Constitution be so amended as to give the power, and then let Congress exercise it by passing the law. And this was the intention of the founders of the government, as shown by their making express provision in the Constitution for its amendment. But I purpose to show that in the case of fugitives from service there was no necessity for legislation on the part of the General Government.

In support of this position I have this important fact. It never was insisted upon by a single delegate in the convention that framed the Constitution, that the States should delegate any power over this subject to the General Government, or any department thereof.

Let us then see what were the relations sustained by the several States to one another, and the rights of the individual State, upon this subject of fugitives from service, previous to the adoption of the Constitution.

Slavery is a relation resulting from, and dependant upon, the municipal regulations of the State in which it exists. Slavery could, therefore, in law, only exist within the State upon the municipal regulations of which it depended.

While all of the States were slaveholding States, before the adoption of the Constitution, the States were respectively in the habit of extending such comity to each other, as to permit the recapture of fugitives from service. It is insisted by some, that right of recapture existed the same as in the case of personal property generally. Others deny that the common law, subsequent to the decision made by Lord Mansfield, in the case of *Somerset against Stewart*, (May 14, 1772,) would allow such recapture. The right of recapture had, however, been exercised without question throughout the colonies and States, up to the time of framing the Constitution.

The insertion of clause 3, of sec. 2, art. 4, was therefore intended to insure a continuance of the same comity between the several States, after the adoption of the Constitution, which had existed before. The clause itself shows that to be all there is of the provision. And "contemporaneous history" shows that to be all that was intended or understood, even by the State of Virginia at the time. It is shown by the Madison papers, that there was a withdrawal of the proposition by Mr. Butler and Pinkney "to require fugitive slaves and servants to be delivered up like criminals," upon Mr. Wilson's objection, that it would oblige the delivering up of the slaves and servants at the public expense; and upon Mr. Sherman's insisting that the proposition was as absurd and unreasonable, as it would be to re-

quire a stray horse delivered to its owner at the public expense. It also appears by reference to the debates in the Convention, that the proposition was never again renewed.

I will now, in addition to the foregoing, show that it was neither intended or understood by the State of Virginia, that this clause required the General Government to return a slave or servant, as expressed in their debates upon the Constitution.

In 2d vol. Elliott's Debates, page 335, is the following extract from remarks of Mr. Madison, as made in the Virginia State Convention, on the 17th of June 1788, upon this subject. "At present (without the adoption of the Constitution,) if any slave elopes to any of those States where slaves are free, he becomes emancipated by their laws. For the laws of the States are uncleritable to one another in this respect. But in this Constitution 'no person held to service or labor in one State under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due. This clause was expressly inserted to enable owners of slaves to reclaim them. This is better security than any that now exists. No power is given to the General Government to interpose with respect to the property in slaves now held by the States." Mr. Patrick Henry, in reply to Mr. Madison, (see page 337, of same vol.) is reported as follows: "*He considered the clause which had been adduced by the gentleman, as a security for this property, as no security at all. It was no more than this—that a runaway negro could be taken up in Maryland or New York.*" And to this remark of Mr. Henry there was no denial, by Mr. Madison, or any other member.

Now when we reflect that this clause was inserted by common consent, to afford facilities to the respective States in their intercourse with one another: and was not bargained nor obtained by any one or more of the States by concessions or considerations yielded on their part in turn, it seems to me absurd to suppose a voluntary surrender of legislative sovereignty on this subject was even contemplated on the part of any of the States. And it appears from the extracts read from the Virginia debates upon the constitution, that neither Mr. Madison or Patrick Henry, in June, 1788, regarded clause 3, of section 2, article 4, as anything but a compact between the States, by which each stipulated to continue in future to extend to every other State the same comity before extended, and enjoyed in relation to reclaiming slaves or servants—the right for a claimant to recapture his slave or servant who had escaped from him without the state, in the same manner that he might within the state.

In the language of Patrick Henry, I affirm of that provision, then, "it was no more than this,—that a runaway negro [or servant] could be taken up in Maryland or New York," or any other State—and I will now show that by giving the clause this plain, obvious meaning and effect; understanding it as it was understood in the Virginia convention, Mr. Madison was right in saying as he did in that Convention, that the clause secured the property of the State of Virginia in slaves in a manner in which it would not have been secured without the adoption of the constitution. Apart from the constitution: Mr. Madison admits that "if a slave elopes from Virginia into a free State he becomes emancipated," and adds, "This clause was expressly inserted to enable owners of slaves to reclaim them. This is a better security than any that now exists." Is it not, even without any legislation on the part of the General Government

or of the States? Let us take a case for illustration. Suppose a slave from Eastern Virginia to have escaped into Western Virginia; how is his owner to reclaim him? He has the right to pursue, to take with him sufficient force to reclaim him. Suppose third persons interfere, and aid the slave, or prevent the owner from asserting his right. What remedy has the owner? No other, certainly, in that State, but a civil action for damage against the person or persons interfering and preventing his reclaiming his slave. And this remedy to the same extent in every particular, is afforded by this 3d clause of section 2, article 4, of the Constitution, without any legislation where the slave or servant has escaped without the State, into Pennsylvania, New York, or any other free State.

In the case of Glen, against Hodges, 9th Johnson's Reports, page 67, this remedy of the owner of a slave under such circumstances, is fully recognized. That was a case tried in the Supreme Court of New York, in 1812. Glen brought an action of trespass against Hodges for taking a negro man slave out of his, the plaintiff's possession at Rutland, in the State of Vermont, in 1810. The plaintiff proved in court that his slave had fled to the State of Vermont, that his son, Jacob S. Glen, as his agent, had proceeded to that State and arrested the slave to return him to the plaintiff, his owner; and that the defendant, to whom the slave had, while in Vermont, become indebted, sued out a writ of attachment against the slave, who was duly served with the same, and thereby taken out of possession of the agent of plaintiff and committed to the jail of the county. The defendant proved that the slave had lived a near neighbor to him in the State of Vermont for some five years; and gave in evidence the writ of attachment, and the return; and the record of a judgment recovered by him against the negro, thereon.

In deciding the case, the Supreme Court of New York, referred to the constitutional provision, clause 3, of section 2, article 4, and fully recognized the right of the plaintiff under this provision to recapture the slave; and while it was not pretended the attachment was irregular, or inconsistent with the laws of Vermont, the court held the constitutional right of the owner superior to all statute laws; and that the attachment being in conflict with this constitutional right of the plaintiff, the proceedings under it were no defence: but that the plaintiff, the owner of the slave, was entitled to recover at common law in an action of trespass whatever damage he had sustained by reason of such interruption on the part of the defendant, to such recapture by the plaintiff.

And this decision, made in the State of New York, recognizes every right of the claimant of the fugitive, and affords him precisely the same remedy that he would have had if the escape and recapture, and rescue of the fugitive had all occurred in the State of Virginia. I call the attention of Senators who insist upon the doctrine held by Mr. Story in the Prigg case, the necessity of legislation by Congress, to this fact. A fact that I affirm cannot be controverted, but is established by an adjudicated case—that the claimant of a fugitive from service has every right of recapture, and as ample remedy at common law under the constitution, against any one interrupting him in the exercise of that right in a free State as he has in a slave State. If any Senator denies this position, I will ask of him to point out what other or further remedy the claimant of the fugitive would have had if the recapture and rescue had occurred in Virginia instead of Vermont, under the laws and in the courts of Virginia, more ample or appropriate than the remedy afforded in the Su-

preme Court of New York, as expressed in the case to which I have referred?

The truth is this clause 3, sec. 2, art. 4, not only gives no power to the federal government to legislate, but it requires no legislation under it to give the slave holder all the rights in a free State that he possesses in a slave State, to recapture the fugitive slave. There is not only no necessity for legislation on the part of Congress, but such legislation has thus far tended inevitably to make this provision, which would otherwise harmonize, directly conflict with other provisions of the constitution.

The 5th art. of the amendments of the constitution providing that no person should be deprived of life or liberty, without due process of law, would have its application and benefits extended to even the fugitives, if no legislation had been resorted to by Congress upon the subject of their recapture.

The case of Jack vs. Martin, decided at the December term 1835, of the Supreme Court of the State of New York, as reported in the 14th Wendell, page 507, illustrates this fact.

In that case the claimant of the fugitive had applied to the Recorder of New York for a habeas corpus on which the alleged fugitive Jack had been brought before the Recorder, and a certificate had been by the Recorder granted to the claimant Martin, authorizing the removal of the fugitive back to Louisiana. Thus far, and according to the legislation of Congress, Jack's rights would have been ended; no other due process of law remained for the protection of life or liberty to him. But his counsel, supposing the 5th article of the amendments of the constitution to be a provision entitled to respect as well as clause 3, sec. 2, of art. 4, immediately on behalf of Jack, sent out, that old writ "*de homine replegiando*," returnable in the Superior Court of Common Pleas of that city; and on return of the writ, filed his declaration setting forth that Martin, the claimant, wrongfully held him upon false pretence, &c. To this plaint, the claimant, defendant in this proceeding, put in several avowries, setting forth fully the grounds upon which the claimant rested the defence to the proceedings. And to these avowries Jack, by his counsel, put in several pleas making a case of issues in fact, to be tried; and then it was that thereupon came a jury, to-wit: that bulwark of civil liberty in every country where civil liberty is respected.

In this case, the Court pay full respect to the provision of the constitution, guarantying to the claimant the right of recapture; but at the same time, pay equal respect to the clause guarantying to every person the benefit of due process of law, for the protection of his liberty. The Court say "the common law writ of '*homine replegiando*' for the purpose of trying the right of the master to the service of the slave, was well known to the laws of the several States, and was in constant use for the purpose, except so far as it had been superseded by the more summary proceeding by habeas corpus, or by local legislation." And the Court add: "The object of the framers of the constitution therefor, was not to provide a new mode by which the master might be enabled to recover the services of the fugitive slave, but merely to restrain the exercise of a power which the State legislatures respectively would otherwise have possessed to deprive the master of such pre-existing right of recaption.

And the Court, in accordance with this plain common sense view of the subject give to each party, the full benefit of all the common law rules of proceeding known and recognized in the Colonies and States previous to, and at the time of the adoption of the constitution. Thus as we have seen, independent of any legislation by Congress or the States, on this compact contained in the constitution, in relation to

fugitives, giving to the claimant of the slave in all the free States, every right and remedy which he has in a slave holding State; and at the same time giving to the person claimed as a slave, the full benefit of that provision of the constitution, that no person shall be deprived of liberty without due process of law.

Mr. Speaker. I have now shown, what it was not necessary for me to show, to support the proposition that Congress has no power under the constitution of the United States, to legislate upon the subject of persons residing in any State claimed as fugitives from service, due to a person in an other State. For I maintain that since it is not only evident that whatever power Congress possesses, must be conferred by the constitution, and the constitution itself provides (Art. 10, of amendments,) that the powers not delegated, or prohibited by that instrument, are reserved to the States respectively or to the people; the truth of the proposition ought to depend upon the constitution alone. If Congress in fact possesses the power, as it must necessarily have been conferred by the instrument, the constitution must by some provision contained in it, show the title of Congress to such legislative power. And when upon a critical examination of the provisions, I had showed that no such power was conferred by that instrument upon Congress, I had the right to rest there and affirm the truth of the proposition, that Congress has no constitutional power to legislate upon the subject of fugitives from service.

But I have not rested here; I claim to have shown, Mr. Speaker, that at the time of the adoption of the Constitution there is not only an absence of any contemporaneous history showing that it was intended and understood that the Federal government should have power to legislate upon the subject of Fugitives; but that in truth all reliable contemporaneous history shows that it was neither suspected by the north nor understood by the slave holding interest that any such power was conferred by the Constitution upon the General Government. I claim also to have shown that there is no necessity for the exercise of any such assumed powers on the part of the Federal Government. That the rights and remedies of the claimant of a fugitive from service are as fully guaranteed, and as ample under the provision of the Constitution, at Common Law, and without any legislation either national or state, in a free State as in a slave-holding State. So that there does not remain even the inadmissible plea of necessity to justify the exercise of this usurped power on the part of the Federal Government. But if any one denies that the Common Law remedy under the Constitution is in every imaginable case as full, complete, and ample as would be desirable; and as strict justice would seem to require; it is obviously in the power of State legislation to supply such defect when shown.

I can imagine no objection to this reliance upon state legislatures if legislation should ever become necessary, except the objection urged by those who advocated and justified the Alien and Sedition laws—that the state legislatures cannot be relied upon. This objection hardly merits a reply. The State legislatures are governed by as high and patriotic sentiments, and as far removed from selfish and unworthy considerations as the National. The past legislation of the country shows that neither the sense of justice or strict regard for the Constitution is improved in a legislature in proportion to its remoteness from the constituency. The past history of the nation by no means justifies a continuance of this distrust of the people. The state legislatures are bound by the same oath to support and respect the same Constitution, under which Congress legislates. There is not therefore, any plausible pretext

of necessity existing as an excuse for the General Government exercising the assumed power of legislating upon the subject of Fugitives from service.

I will now proceed to consider briefly the proposition contained in the third resolution, that the act of Congress, in relation to fugitives from service, approved Sept. 18, 1850, is in several important particulars repugnant to the express provisions of the Constitution.

The prominent objects of the Constitution, as set forth in the preamble, are to establish justice, to promote the general welfare, and secure the blessings of liberty to ourselves and posterity. The framers of the Constitution, as I have said, objected to the word *'slave'* being admitted in the instrument, "lest they might seem thereby to give countenance to the idea that there could be *property in man*." The principles asserted in the declaration of Independence were that every man had equally the same absolute rights. That the rights of life, liberty and the pursuit of happiness, were absolute rights, belonging to *all persons* equally; and that to secure these rights was the appropriate object of all just governments. The distinctive feature of the Constitution so far as any political sentiment is therein expressed, is an adherence to these principles. It is announced in the preamble, and expressed in those provisions, that "no title of nobility shall be granted," &c. and all these clauses so general in terms as to exclude all ideas of inequality, or any departure from that general equality of rights asserted in favor of all persons. The general rule of construing statutes that the statute should always be construed in favor of *liberty* is therefore peculiarly applicable to the construction of the Constitution of the United States. The instrument therefore by this reasonable rule of construction, as it was originally drafted, ought to have been construed as containing the principles expressed in the 5th Article of the Amendments of that instrument. But so jealous were the founders of this government of some possible future encroachment upon their liberties, that they seemed unwilling to trust any *constructive rules* as safe guards of the personal liberty of any individual subject of the government. They therefore inserted the provision, in the most clear and express language, in the Constitution, *that no person shall be deprived of life, liberty or property without due process of law*.

The act of Congress approved Sept 18, 1850, in relation to fugitives from service, is in direct conflict with this provision of the Constitution. The law does not provide, or permit any person who happens to be charged under the law with the crime of owing another person service in another State, to have the benefit of "due process of law" to defend against such a charge.

What, then, is the precise import and meaning of "due process of law?" It is well understood, I suppose, that the phrase "due process of law" as used in the Constitution, is a legal term, having a fixed and determinate meaning. In its legal acceptance, it means nothing more nor less than this:—a suit instituted and conducted according to the prescribed form and usages of Courts of Justice for ascertaining guilt or determining title. In the case of *Taylor v. Porter*, 4th Hill's Rep., p. 140, the Supreme Court of New York, held such to be the legal import of the term "due process of law." And I apprehend no one understands this provision of the Constitution, as less comprehensive in its import. I am certain he would not if his own life or liberty, or even property, were dependent upon a construction of the provision.

And upon referring to the act of Congress under consideration, it will indeed be seen that we all in

fact do have an interest under the law, in the construction of this provision of the Constitution. For this act of Congress is not a law in language leveled at the colored man, or any distinctive class of men, who may be designated as "aliens," or colored persons, or foreigners. The law is general in its terms and provisions. It is an engine of mischief framed and adapted for use against any person residing in any of the States or territories of the United States.

The 10th section of this act provides, "that when any person held to service or labor in any State or Territory, or in the District of Columbia, shall escape therefrom, the party to whom such service or labor shall be due, his, her or their agent or attorney may apply to any court of record therein, or judge thereof, in vacation, and make satisfactory proof to such court, or judge in vacation, of the escape aforesaid, and that the person escaping owed service or labor to such party; whereupon the court shall cause a record to be made of the matter so proved, and a general description of the person so escaping with such convenient certainty as may be; and a transcript of such record authenticated by the attestation of the clerk and of the seal of said court being produced in any other State or territory or district in which the person so escaping may be found, and being exhibited to any judge commissioner or other officer, authorized by the law of the United States to cause persons escaping from service or labor to be delivered up shall be held and taken to be full and conclusive evidence of the fact of escape, and that the service or labor of the person escaping is due to the party in such record mentioned. And upon the production of other and further evidence, if necessary, either oral or by affidavit in addition to what is contained in said record, of the identity of the person escaping, he or she shall be delivered up to the claimant. And the said court commissioners, judge, or other person authorized by this act to grant certificates to claimants of fugitives, shall upon the production of the record and other evidence aforesaid, grant to such claimant a certificate of his right to take any such person identified, and proved to be owing service or labor as aforesaid, which certificate shall authorize such claimant to seize, or arrest and transport such person to the State or territory from which he escaped. *Provided*, that nothing herein contained, shall be construed as requiring the production of a transcript of such record as evidence, as aforesaid; but in its absence, the claim shall be heard and determined upon other satisfactory proofs competent in law."

I have here read one section of this act that its exact provisions might be compared with that of the constitution, providing that no person shall be deprived of liberty or property, without due process of law. Now let us carefully look to this section, which provides for depriving a person of his liberty, and see whether it is to be only by due process of law.

The proceeding provided for, it will be observed may be had against any person, white or black, man, woman, or child. No age, nor sex, nor condition, nor relation of life, exempts a single individual person from the operation of the law. It is as general, as any statute of the criminal or civil code.

I am not to be answered in considering this proposition, by being told, that it is not to be presumed, extreme cases will happen under the law. That the law is so abandoned and wicked, that men cannot be found sufficiently profligate to enforce it, is one proposition; but that its provisions, in the terms in which it is enacted, are not repugnant to the Constitution, is quite another.

I am not here considering what will be the ordinary use to which this law is to be applied. It is the pro

visions of the law, that I affirm conflict with the constitution. And to ascertain the truth of the proposition, we must regard the law as an act to be enforced to the extent of the limits prescribed by the language and terms of the enactment.

I do not say, nor would that be pertinent to the argument, that any Senator upon this floor is in danger from this law. I do say that the provisions of the law embrace every Senator, and every person within this State.

And to illustrate the flagrant violation of that provision of the constitution under which we have all supposed we possessed our lives, our liberty and property in security; that we would only be deprived of either by due process of law; let me suppose, Mr. Speaker, for illustration, a case, that will at least bring a consideration of the law forcibly to view. I will suppose a stranger to enter this Senate chamber with a certificate from a Commissioner particularly describing any honorable Senator on this floor, and authorizing the transportation of such "person" to Texas, Florida, or any other remote State in which the certificate recites that such person has been so proved (by transcript and affidavit) to owe service. I affirm that by the provisions of this law, such Senator must be summarily deprived of his liberty, and removed like a felon, to the State designated by such certificate. Such are the provisions of the law. "It is so nominated in the bond." The terms of the law, I repeat, are as general as any statute ever enacted by Congress. In the first place the transcript is to be of the *ex parte* proof, made by affidavit or even orally, by any person. No matter how abandoned, or how desperate. The oath or affidavit of any black leg or gambler in Texas, Florida, or any other remote place, or of any felon from any penitentiary in the United States, fully complies with the law. Any person may, in any territory or State, make his proof by deposition or orally made or procured to be made, before a judge, that any other person has fled from such State or territory, owing him service; and it makes a record, of which a copy is conclusive evidence of the fact that such person has so fled owing service. An affidavit may by a like person, in like manner, be made secretly and unknown to the person against whom made, of his or her identity; and the Commissioner, without even having seen the person to be sacrificed, is by this law required to make out and deliver to such claimant, his certificate or warrant, empowering him to suddenly seize and hurry away his victim without affording him or her the slightest form of defence. The first notice of any claim or charge against the victim of this despotism, may be the execution of the sentence already pronounced behind his back against him.

All this I have shown from the words of the law may be by its terms perpetrate upon "any person." And unless it can be shown a Senator is not a "person," if this law is not unconstitutional, we hold our personal liberties in this hall, so far as the laws of the land are concerned, not by the Constitution, but by the grace of the abandoned and profligate, who forbear using this engine of despotism against us.

Whenever any person shall be made the mark of premeditated villainy, where is the security of such person? The aid of a perjured or deluded individual, has only to be obtained, to make such affidavit in a remote State, and enforce the transcript and affidavit thus secretly fabricated; and the fell purpose of suddenly despoiling the defenceless of personal liberty, is consummated.

Can any one then, without denying that "due process of law," includes the benefit of making legal defence, according to the general usages of Courts of

law, fail to perceive the conflict? There can be no doubt to even the unlearned in law, that due process of law is denied by the provisions of this act.

Just apply the provisions to the inferior right, that of property. Suppose a man in a neighboring State to have been permitted to reclaim lost property by such a proceeding. That any man who may have lost any property, may have the right in such foreign State to go before a judge, and make his *ex parte* proof, and procure a copy of the record, and bring such copy into this State, and then secretly to make his affidavit, identifying the property in possession of any citizen of this State, and thereby procure a warrant, without the knowledge of the person in possession, to seize and take away the same, without further proof of title. Could such a proceeding for a moment be doubted to be in violation of that provision of the Constitution, which ordains that "no person shall be deprived of life, liberty or property, without due process of law? Certainly not. Shall life and liberty then, be left divested of this Constitutional protection, which is first extended to them, and lastly to property.

And even suppose Congress were vested with power under article 4 of the Constitution, to legislate upon the subject of fugitives, and that article 5 of the amendment had been an original article, Congress would then have been bound to so legislate respecting fugitives, as not to infringe upon the provisions of article 5. But when it is known that article 5, with which the fugitive act is so in conflict, was adopted as an amendment of the original draft containing the provision in relation to fugitives; if there be any inconsistency between the two provisions of the instrument, that relating to fugitives and this subsequent amendment, guarantying to all persons the benefit of "due process of law," the latter provision must obtain and have its full force and effect, even if it be to entirely abrogate such former provision relating to fugitives.

Mr. Madison, upon the passage of the alien and sedition laws, wisely and patriotically objected to those laws that the alien act "united legislative and judicial powers to those of the Executive," and said: "It has become an axiom in the science of government, that a separation of legislative, executive, and judicial departments, is necessary to the preservation of public liberty." "No where has this axiom been better understood in theory, or more carefully pursued in practice, than in the United States." And we all know that the Constitution, in express language, keeps these departments, the legislative, judicial and executive apart and distinct. But how is it with this law?

Where is the distinction between the legislative and judicial in the 10th section of this fugitive law? True, it is enacted professedly to carry out the provisions of the Constitution; that when one person owes labor, or service to another person, in another State, from which the person so owing has fled, the person owing the service under the laws of the State from which he fled, shall be delivered up upon such claim. This act, however, instead of declaring what facts should entitle one person to recover specific service of another person, in the case mentioned in the Constitution, and the remedy to be awarded, and then leaving the law, like all other laws to be applied by the judiciary upon an appropriate case made by the claimant before that department, by due process of law, seems to be of a very different character. This 10th sec. declares the law, pronounces the judgment, and awards execution.

The Constitution having then in express language declared that the legislative and judicial departments shall be separate, this act is repugnant to the provisions of the Constitution, in that it does what no gov-

ernment but a despotic one ever did, unites and blends the judicial with the legislative power.

The 10th section of this act, as we have seen, requires the claimant to prefer his claim, (within a different State from the one in which the alleged debtor resides,) with such vouchers as may satisfy a judge of the existence of the claim. Is this a trial? Certainly not unless, the universal rule, that to constitute a Court and trial, there must be the plaintiff and defendant, as well as a judge, is erroneous, and a trial can in fact be had of the respective adverse rights of two parties, by one party alone. This then is only an exhibition of a claim preparatory to bringing it forward for enforcement in Court against any one. The judge who makes a record of the matters proved before him by the claimant, in the other State only furnishes a transcript "of the matters so proved" as expressed by the record; and no judgment is entered, or pretended to be entered in the record made between the persons in interest. This entire transcript which the claimant takes with him out of the State where made is not even the transcript of a judgment *ex parte*. It is at most of no more legal force than an *ex parte* deposition or affidavit. Yet it will be seen by this same sec 10, that the act itself commands the Commissioner upon the exhibition of this transcript to him accompanied by an affidavit designating the person against whom it is directed, to issue his warrant or certificate authorizing the capture and expatriation of the person designated, without the State. The act itself leaves no more discretion to the Commissioner than the precept of a Court directed to a Sheriff leaves to such officer in executing the judgment of the Court.

This adjudication upon facts is made by Congress and expressed in the act, leaving no exercise of judgment to the commissioner, and requiring none to be pronounced by him. It will be perceived that by this 10th section, no provision is made for any adjudication at any stage of the proceeding. The judge in the foreign State is in the first place required to make a record of satisfactory "*ex parte*" proof having been made before him, of service being due and owing to any one, from some person who has fled from such State in which the service is due; and also to make out a copy of such record. The commissioner in the other State to which such transcript may be presented, is by the act required without any trial or any judicial act, upon additional proof of identity, either oral, or by affidavit, in addition to the transcript, to issue a warrant, a final execution, under the name of a certificate, for the seizure and removal of the person charged as so owing service. The Judge gives no judgment. All his duties, as prescribed by this section, are ministerial. Upon certain facts being proved by affidavit, or otherwise, to his satisfaction, he is ordered to make out a record, and transcript of such record, in the same manner that clerks, and sheriffs, and other ministerial officers of court, are required in discharge of their respective ministerial duties, to take and certify, *ex parte* satisfactorily proven facts. The duties of the commissioner, under this section ten, are still less discretionary, and strictly ministerial. There is nothing resembling judicial, in the character of the duties imposed upon him by this section of the act. The language of the law, after reciting that the transcript shall be conclusive evidence. (not to be denied or doubted) is, that "upon the production by the said party of other and further evidence, if necessary, either oral or by affidavit, in addition to what is contained in said record, of the identity of the person escaping, he or she shall be delivered up. And the said commissioner, (or other officer, as the case may be,) shall, upon the production of the record and other evidence aforesaid, grant to such claimant a certi-

cate to take away such person," &c., "which certificate shall authorize such claimant to seize or arrest, and transport such person to the State or territory from which he escaped." All the duties of the commissioner or other officer so required to issue the certificate for the sudden seizure and transportation of a person to a distant State or Territory, is as strictly ministerial as is the duty imposed upon a Clerk of a Court to issue a warrant, or final execution upon a judgment of the court, of which he is a ministerial officer. Like the clerk, the commissioner makes out his warrant a final execution, in the absence of, and perhaps without even having seen the person against whom issued.

Such is the course of proceeding prescribed and authorized by the provisions of this law. The truth is, and no argument and ingenuity can disguise it, Congress, in the passage of this act, has not only arrogated to itself legislative power never delegated by the constitution; but in the exercise of that power has violated the express provisions of the constitution by usurping and exercising the judicial power of the government. Imitating the worst vice of a despotic government, in the exercise of its unconstitutional usurped power, Congress not only legislated a wicked law, but also enacted judgment and ordered execution of the same by the provisions of the law thus enacted.

Again, this act of Congress is repugnant to the provisions contained in the 2d clause sec. 9, of art. 1, of the constitution. It is there provided that "the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it"—Certainly no American citizen will consent to the doctrine that the privilege of this celebrated writ shall be regarded as less liberal and beneficent toward the protection of civil liberty than in a monarchical government. At the time of the privilege of this writ being secured by this express provision, the nature and character of the writ of habeas corpus, were the same; and were as distinctly understood as at this time. The writ was then as it is now, the most celebrated writ in the English law. It was considered, as it had been for centuries in England, the great and efficacious writ in all manner of illegal confinement. It was then as now, always granted upon suitable application, as a remedial writ for illegal confinement; and was directed, as it still is, to the person charged with illegally depriving another of his liberty, commanding him to produce the body of the prisoner with the day any cause of his detention, to do, submit to, and receive, (in the language of the writ,) whatsoever the judge, or court awarding such writ shall consider in that behalf. The adaptation of the writ in terms, to the liberal offices for which designed was indeed beneficent; but the privilege of the writ was found in the operative effect of the proceedings had under it. Both at common law and under all the various statutes enacted, in England, in relation to proceedings under this writ, every thing was always presumed in favor of the liberty of the subject. The person deprived of his liberty had the most full and ample benefit of a fair and impartial investigation of all of the causes of detention set forth in justification of his imprisonment. And unless, against all that he could show and urge to the contrary, the person depriving him of his liberty could still show, that the imprisonment was strictly legal, the prisoner being presumed to be entitled to his liberty was set at large. At the adoption of the constitution, the privilege of the writ of habeas corpus was considered as an ample and complete remedy for the speedy removal of all unjust and illegal confinement. Under this writ a full and careful investigation might always be had as to the legality or illegality of the imprisonment of any person.

In this sense of the words, the constitution then guarantees to every person the benefits of the writ of habeas corpus.

In the sixth section of this act of Congress is the following provision: "And the certificates in this and the first section mentioned shall be conclusive of the right of the person or persons in whose favor granted, to remove such fugitive to the State or territory from which he escaped; and shall prevent all molestation of said person or persons, by any process issued by any court, judge, magistrate or other person whomsoever."

This provision is so carefully expressed that there is no ambiguity or uncertainty as to its meaning. The certificate, (which as I have shown, may be obtained in the absence of the prisoner,) the law says shall prevent all molestation of said person or persons by any process issued by any judge. Now if molestation means hindrance, disturbance, or delay, or any thing which the word is understood to signify; and if process, in its legal signification and in its common acceptation, means a writ, then obviously, according to this provision of the law, although a judge might issue the writ, the person held by the certificate could not in this case, have the privilege of the writ of habeas corpus.

It is said that the writ of habeas corpus is not superceded by this provision of the act; that the writ may be issued by the judge, but that an obedience to its precepts need not be yielded by the claimant, holding the person under such certificate; and the conclusion of this argument is that the writ having issued is not suppressed; and the claimant holding his certificate by not paying any regard to the process is not molested, or hindered in the removal of his victim, thereby. But does not every one see that the man, or woman, or child, forcibly held under such certificate and about to be removed from home, and from the State, is denied all the privilege of the writ of habeas corpus? And it is the privilege of the writ, that the constitution provides shall never, except in the case of invasion, be suppressed.

I have already alluded to that feature of the law which makes its heinous provisions applicable to the citizens of the District of Columbia and the territories of the United States; when there is not a word in the Constitution showing or intimating that the compact between the several States for the reclaiming of fugitives was ever solicited or understood as extending, or being applicable to the inhabitants of such district and territories. The professed object and purposes of the constitution should be regarded. The principles of justice and liberty forbid the enactments of slave laws, by Congress over the citizens of its own territory, who sustain only the single direct relation of citizens of the general government, and toward whom the duty of protection on the part of that government, and of allegiance on the part of the citizens are correlative duties; incumbent alike on the government, and governed respectively. And the federal government is not less derelict in duty in imposing such legislation over the inhabitants of the territory, and thus giving stones instead of bread to its children, than would be the citizens of the territories in utterly disregarding their duty of allegiance, and in engaging in treasonable enterprises against the government.

The 4th article of amendments of the Constitution provides that "the right of the people to be secure in their persons, houses and effects, against unreasonable searches, and seizures shall not be violated." This act of Congress is, in its terms, opposed to that provision of the Constitution. We have seen that the fugitive law is general in its terms; that it has no respect to color or condition; that the affidavits and transcript, to

authorize an arrest and transportation out of the State, may be prepared against any person. It is, therefore, apparent, from the provisions of article 10 of the act of Congress, that the right of the people, of "any person," to be secure in his or her person against unreasonable seizures, depends upon the fact of the seizure authorized by article 10 of this act being reasonable or unreasonable. But is this security against unreasonable seizure, that "any person" may, at any day, or any hour of his life, for no crime or offence, be liable to such seizure under such circumstances, and with such fearful and fatal consequences to his or her liberties, as has been shown to be authorized by the provisions of this act of Congress?

I ask the Senator who shall assert that these provisions of the fugitive law are not repugnant to the provisions of the Constitution, to which I have referred, to fairly test the provision by supposing, in the language of the law, "any person," any man, woman or child, a dear friend of his own, to be the subject of such arrest. And with such an example and illustration of the provisions and practical application of the law, its defenders must say that it is not "the entertainment to which invited" by the Constitution of this free Republic. It may be regarded as unfair in argument to resort to extreme cases to illustrate the operation of this law. I know that it will be said that the object of the law is to reclaim fugitive slaves. But I again reply to such objection—I am considering only the provisions of the law. These are general; and to fairly and fully test the constitutionality of these provisions, it is not only fair, but necessary, to consider the operations of the law as general, as its provisions. If I show that the practical application of this law, according to its provisions, conflicts with any provision of the Constitution, I thereby show that the provisions of the act are repugnant to those of the Constitution.

The 8th Article of Amendments of the Constitution, provides that excessive fines shall not be imposed; nor cruel and unusual punishments inflicted. This act of Congress provides, that any person who shall aid, alert, or assist such person so owing service, or labor as aforesaid, directly, or indirectly to escape from such claimant, his agent, or attorney, or other person or persons legally authorized as aforesaid, or shall harbor or conceal such fugitive so as to prevent the discovery and arrest of such person, after notice or knowledge of the fact that such person was a fugitive from service or labor as aforesaid, shall, for either of said offences, be subject to a fine not exceeding one thousand dollars, and imprisonment not exceeding six months. This is the "fine," and the "punishment" for aiding or assisting, directly or indirectly, a person owing service in another State, or the territory of the United States, from which he or she may have fled. The question that arises then as to the reasonableness of this "fine," and "punishment," I apprehend will be universally and unanimously answered by every one's sense of right and justice in the same manner; that the "fine" is "excessive," and the punishment affixed to such acts unusual. And this answer is in accordance with the expressed opinions of the slaveholding States. They have Statute laws upon the subject of harboring fugitive slaves. The Statute of Virginia upon the subject, expresses what the legislature of that State thinks a reasonable fine for the offence of harboring a slave, by the following provision:

"Any person harboring or employing a slave without the consent of his master, shall forfeit to the master, not less than one, nor more than five dollars, for every day of such harboring or employment."

It may also be objected to this law of Congress, that it conflicts with the express provisions of the Constitution, that in certain cases it confers judicial powers, upon the Commissioners, belonging only to Judges of the Supreme Court of the United States. If the duty of the Commissioner as prescribed by this act is judicial, I insist the objection upon this ground to the Constitutionality of the law is evident; for his act being conclusive, and not subject to the revision of any superior court, the Commissioner, so called, is in fact a Judge. And his appointment being made by another Court, and without any fixed compensation, instead of being by nomination of the President, with the advice and consent of the Senate, is evidently in conflict with the express provisions of the Constitution.

The sixth section of the act authorizes the commissioner "to hear and determine the case" mentioned in that section, and the same section makes his judgment final and conclusive, and even exempts it from any review in any other court. The duties and powers of the commissioner under section six are, therefore, evidently judicial, although the duties conferred upon him under section ten of the act seem to be only ministerial. The judicial power and duty conferred and prescribed in section six of this law, to pass final judgment upon personal liberty, constitutes the officers, upon whom this power, and duty is conferred, judges. It matters not whether they are denominated judges, justices, or commissioners; it is only by having respect to the duties and powers with which they are invested, that their official character is determined. Their duties and powers being judicial, they are in fact as to the provisions of the sixth section, judges—either of a superior or inferior court. Their powers are concurrent with the Supreme Court, but are also independent of that court, inasmuch as the judgment is made final, and no appeal, or review of such judgment is allowed by any other tribunal.

But it is not material whether they are regarded as judges of the Supreme Court or of an inferior Court. This is the provision of the Constitution which applies in either case—in section one, of article three, it is provided that "the judges, both of the supreme and inferior courts, shall hold their offices during good behavior; and shall at stated times receive a compensation which shall not be diminished during their continuance in office."

There is no certain or fixed compensation provided for these commissioners. Only the contingent compensation of \$10, and that to be paid at no stated times. It is all uncertain whether the pay-day may occur daily, or not for years. And when it does occur, it is liable to be diminished from \$10 to \$5, if in obedience to law and justice, a judgment be rendered for the defendant instead of the plaintiff. This "compensation" of this judge, then, instead of being "fixed and certain," and paid to him "at stated times," as required by the constitution, is by this law law of Congress made to depend, like that of the brigand, upon his predatory success.

Mr. Speaker, I do not propose to extend my remarks in pointing out all the particulars wherein the act of Congress under consideration conflicts with the express provisions of the constitution. That this law does conflict in those particulars mentioned, I claim to have shown by such references, to the law, and to certain provisions of the constitution with which in conflict, as to preclude successful denial or reasonable doubt.

Believing as I do, and showing, as I think I have, good reasons for that opinion, that Congress has no power to legislate at all upon the subject of clause 3,

section 2 of article 4, these conflicts of this act of Congress with important express provisions of the constitution, I regard as the results of assumed legislative power. The very act of the federal government of assuming the power to legislate over the citizens of the respective States under this clause, is, in my judgment, an usurpation; and from the exercise of which, unexceptionable laws ought not to be expected.

I have shown that by the strict rules of law, Congress has no power under the Constitution to legislate upon the subject of fugitives. We have seen that strong political biases, in the early history of our government, inclined, both the legislative and judiciary branches to depart from long established, and well understood rules of construction; and to arrogate to the Federal Government certain powers never conferred by the Constitution; and that this assumed power, though often exercised, has never been acquiesced in; but on the contrary, has been constantly denied by those who hold the Constitution the only source of power to the Federal Government.

The doctrine of strict construction, as held by Jefferson and Madison, in relation to persons, has been conceded by the best jurists of all parties for a quarter of a century. We have seen that Mr. Story, in his Commentaries, admits the rules which would at once set aside, not only all legislation of Congress under clause 3, sec. 2, art. 4, of the Constitution, but even the Alien laws and Sedition laws, as utterly unconstitutional. And Daniel Webster, it is well known, as a jurist, has always held that Congress had no power to legislate upon this clause of the Constitution.

The following is the language uttered by him on the subject in his speech of 20th March, 1850, in Congress:

"When it is said that a person escaping into another State, and becoming therefore within the jurisdiction of that State, shall be delivered up, it seems to me the import of the passage is that the State itself in obedience to the constitution, shall cause him to be delivered up. That is my judgment, I have always entertained it; and I entertain it now."

And yet Mr. Webster, entertaining and expressing the same legal opinion expressed by Mr. Story, in his commentaries, in that same speech showed but too plainly that, if called upon to act officially, he would, like Mr. Story, have gone contrary to his own long entertained and deliberately expressed opinion of the constitution.

Mr. Speaker. Entertaining as I do the sentiments expressed in relation to the principles of our government, and the powers and purposes of the constitution, it is unnecessary for me to say any thing upon the last of the series of resolutions under consideration. That resolution only in substance affirms that it is the duty of Congress to repeal any laws of its own enactment, by which any person is deprived of such inalienable rights as the constitution has in express language guaranteed to them.

If there are such laws now in force, no one can reasonably object to their repeal.

The consideration of these resolutions has been objected to by some, owing to the excitement occasioned throughout the free States by the recent enactment of this law of Congress. To such objections I have to say, such excitement has its cause. There was excitement upon the Stamp Act; and kindred statutes, when enacted. There was excitement when the Alien and Sedition laws were enacted. And there is excitement when the fugitive law of 1850 has been enacted;—a law more repugnant to every American sentiment than all the other odious enactments referred to.

This excitement and general dissatisfaction so pro-

duced can never be permanently allayed, but by removing the cause. This has been found true in all these preceding cases; and it will be found equally true in this. The government in all these cases of excitement, has unfortunately found the advocates of such unjust and odious legislation, its loudest professed friends. Professions of loyalty to the Crown, or of attachment to the Union, has always been the strong defence of arbitrary measures and unjust enactments. Ours is a government of the people. Its strength and perpetuity depends upon the maintenance of the principles

of justice, liberty, and equality, upon which it is based. All the navies and military forces of the world could not ensure the perpetuity of our government; nor would its preservation be of any worth to ourselves or posterity, if the soul and sentiment of our free institutions, the principles which constitute its excellencies, and true glory were extinguished. It is therefore a duty as well, as a part of wisdom for us, by a candid and fearless expression of our sentiment upon this occasion, to contribute something to that correct opinion, which should control every free government.